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No. 692. *October Term, 1889.*

Supreme Court of the United States.

The Central Transportation Company,
Plaintiff in Error,

vs.

Pullman's Palace Car Company,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OF PLAINTIFF IN ERROR.

JOHN G. JOHNSON,
For Plaintiff in Error.

Allen, Lane & Scott, Printers, 229-231-233 South Fifth Street, Philadelphia.

STATEMENT OF THE CASE ON BEHALF OF THE CENTRAL TRANSPORTATION COMPANY, PLAINTIFF IN ERROR.

The Central Transportation Company is a corporation which was incorporated in December, 1862, under the general manufacturing act of the State of Pennsylvania, with an authorized capital of $200,000, for the term of twenty years. The basis of the incorporation was the articles of association, printed on pages 72 and 73 of the Record. The manufacturing act is dated the seventh day of April, 1849, and is to be found in the Pamphlet Laws of Pennsylvania for that year, at page 563. The important parts of the act are printed in the appendix. It provides:—

"When any five or more persons may desire to form a company under the provisions of this act, for the purpose of carrying on the manufacture of woolen, cotton, flax or silk goods, or iron, paper, lumber or salt, in this Commonwealth, and shall subscribe, as capital stock, for that purpose, a sum not less than $20,000, in such shares as they may have agreed upon, not less than fifty dollars a share, and actually paid unto such persons as they may have appointed to receive the same, the one-quarter part of the capital stock so subscribed, it shall and may be lawful for them to sign a certificate in writing," &c.

By an act of Assembly of the first day of April, 1853, P. L., 269, the provisions of the act of 7th April, 1849, were extended to

"Companies formed for the manufacture of articles from iron and other metals, or out of wood, iron and other metals."

The articles of association of the Central Transportation Company, which constituted its charter, and which furnished the only information we have as to its purpose, recite:—

"The company has been formed for the purpose of the transportation of passengers in railroad cars constructed and to be owned by the said company in accordance with the several letters patent granted to T. P. Woodruff, to wit: Letters patent Nos. 16,159 and 16,160, dated December 2d, A. D. 1856; No. 24,259, dated May 31st, A. D. 1859, and No. 26,942, dated January 24th, A. D. 1860."

The general act conferred upon the company no right of eminent domain. It had no power to use cars, saving as the right to such use resulted from the power conferred upon it to manufacture them. It had no right to construct railroads; nor to use upon such railroads its cars, saving to the extent that such right might be conceded to them by railroad companies.

By an act of Assembly of 1865 the capital stock of the company was allowed to be increased to $2,000,000. This increase was made antecedently to the year 1870. On the ninth day of February, 1870, an act of Assembly was passed, which appears on page 74 of the Record. It provided:—

"That the charter of the Central Transportation Company, incorporated under the act of Assembly entitled 'An act to encourage manufacturing operations in this Commonwealth,' approved April 7th, 1849, and the supplements thereto, be, and the same is, hereby extended for ninety-nine years from the expiration of the present charter. And said company are hereby empowered to enter into contracts with corporations of this or any other State for the leasing or hiring, and transfer to them, or any of them, of their railway cars and other personal property, and shall have power to increase their capital stock to $200,000."

On the seventeenth day of February, 1870, being then in possession of one hundred and nineteen sleeping cars, with their equipment, and being also the owner of numerous patents for the construction of improvements in such cars, and the holder of a large number of contracts with various railroad companies, permitting the running of its cars on the railroads of the latter, it entered into an agreement of lease with the Pullman Palace Car Company, which appears on page 32 of the Record.

By this contract it leased and transferred, for the term of ninety-nine years, to the Pullman Company, all said cars and equipment, patents and contracts, for a rental of $264,000 per annum, to be paid quarterly. This lease, *inter alia*, provided:—

"*Sixth.*—That the parties hereto shall and will, at all proper times and manner, exert their influence to obtain renewals or new contracts with said railroad companies, for and in respect to the use and employment of the cars of the second party, on and over their lines of railroads, in carrying on their said business, and the first party shall and will not engage in the business of manufacturing, using, or hiring sleeping cars while this contract remains in full force and effect."

The lease further provided:—

"*Eighth.*—In the event that any of the railroad companies mentioned in the assigned contracts shall at any time during this agreement refuse to permit the cars of the second party to be run on and over their respective lines of road, so that, by reason of such prevention or refusal, the profit, income or revenue derived from and under any other and remaining contracts with other and remaining railroad companies mentioned in the assigned contracts shall fall below the sum of $264,000, then and in that event said second party shall have the right either to declare this contract null and void, and surrender to said first party the said hereinbefore demised property, or shall and will pay in like manner, in lieu of the said sum of $264,000, such sum or share of the net revenues from the remaining lines of roads as the parties hereto may at that time agree upon."

Immediately after the execution of the lease the Pullman Company took possession of all the demised property, and remained in possession of the same until the first day of July, 1886.

On that day, claiming that by reason of a refusal of some of the railroad companies to permit sleeping cars to be run over their lines, the income derived from the remaining contracts had fallen below the sum of $264,000, it declared the said lease null and void, and terminated the same. Copies of the resolution of the board of directors of the Pullman Company, and of the letter which communicated said resolution to the plaintiff, appear on pages 74 and 75 of the Record. This letter was accompanied by what purported to be a surrender of the property which had been demised. It is but fair to say that proceedings are now pending between the two companies in consequence of the averment of the plaintiff that the income derived from the companies which still permitted sleeping cars to be run over their lines by the Pullman Company did not fall below $264,000 per annum; and that no complete and proper tender was made. We only state this for fairness; but so far as this record goes, and so far as concerns the action of the court below, it appeared that on the first day of July, 1886, the Pullman Company, for cause, defined in the lease itself, had terminated such lease, and had surrendered to the Central Transportation Company the property which it had received thereunder.

The present suit is for the rental which fell due up to the first day of July, 1886.

The plaintiff offered to put in evidence the said lease, its charter, and the act of 9th February, 1870. It further offered to prove (see page 31 of the Record):—

"That in pursuance of the said contract of February 17th, 1870, the patent rights, contracts, and cars of the plaintiff were delivered to defendant, and continued in the possession of the defendant under said contract until the first day of July, 1886, up to which time defendant insisted upon retaining them; and that on the first day of July, 1886, the defendant for the first time tendered them unto plaintiff, said tender having been made by letter dated June 28th, 1886."

The court below held that the contract of lease was *ultra vires* and contrary to public policy. It refused to allow the lease to be put in evidence or any of the offered facts to be proved. It entered a judgment of nonsuit against the plaintiff.

ASSIGNMENTS OF ERROR.

1. The court below erred in refusing to admit the lease by plaintiff to defendant; the charter of the plaintiff; and the proof that on the first day of July, 1886, the lease by the defendant had been declared to be at an end.
2. The court below erred in entering judgment of nonsuit.

ARGUMENT.

We will discuss the case under four heads:—

I. Was the contract *ultra vires?*
II. Did it create a monopoly which made it void?
III. Was it contrary to public policy and therefore, void?

IV. Even though the contract was contrary to public policy and *ultra vires*, was there not an estoppel upon the defendant against setting up such a defense to the claim for rent which fell due on the first day of July, 1886?

I. Was the contract *ultra vires?*

We will discuss this under two heads:—

(*A.*) Was it *ultra vires* if the act of February, 1870, did not specially authorize it?

(*B.*) Was it *ultra vires* in view of said act?

We will first consider subhead *A*.

We concede that in the absence of legislative authorization it is not possible for a corporation of a *quasi* public character to sell, or to lease, its franchises, or so much of its property as is necessary for the exercise of such franchises. Were it otherwise, a corporation like a railroad company, specially clothed with the right of eminent domain, not for its own benefit, but for that of the public, could transfer to some one not satisfactory to the Commonwealth the performance of the duty upon it personally, resulting from its acceptance of the grant. Franchises, like fiduciary and discretionary powers, cannot be delegated without the assent of the body which creates them.

A corporation which accepts from the legislature a power to take public property, to use public streets, or to do some act which would be impossible to individuals or to corporations not clothed with the special privilege, is a public agent which accepts a right upon condition of performance of a duty. It is impossible for it to divest itself of such duty by a transfer to others.

In Thomas *vs.* Railroad Company, 101 U. S., page 71; in Pennsylvania Company *vs.* St. Louis Railroad, 118 U. S., page 307; and in Oregon Navigation Company's Appeal, 130 U. S., page 1, *quasi* public corporations sought to lease, or to dispose of, their franchises and the property necessary to their use, in the absence of legislative authority authorizing such lease or disposition. The transactions were held void.

In the present case, however, no privilege was conferred

which required the performance of some duty as an equivalent. The corporation never became a trustee for the public to discharge a duty because of a privilege conferred. It was vested with a franchise to be a corporation, to use a seal, and to act without its members becoming individually liable, saving to a certain extent, for its debts. It was permitted to do nothing which could not be done by an individual. Its sole power was to manufacture cars under specified patents. It was in precisely the same position as that of a limited liability company, which is only permitted to do what may be done by individuals; which is not a corporation; but which, under the laws of Pennsylvania, may use a common seal, and may act without its members being liable for its debts.

It does not require an act of Assembly to permit a railroad corporation to sell such of its real and personal property as is not necessary for the exercise of its franchises. None of the property acquired by a manufacturing company is necessary to the exercise of its power to manufacture; because it may locate other property at any point which may please it, and may there carry on its business. A railroad corporation, however, is only authorized to locate a road between certain termini. After it has located the same, its power further to locate is at an end. Its right of way, therefore, becomes absolutely necessary to the continuance of its railroad. There is, therefore, a very obvious reason for requiring that such property, so necessary to the exercise of the *quasi* public franchise, shall not be disposed of. There is no such reason in the case of a manufacturing corporation, which may build, or buy, as many mills as it may see fit.

The Central Transportation Company, though called a "transportation company," was, as we have said, a manufacturing corporation, with no right to transport, saving as the same resulted from its right to use the cars which it might manufacture. In selling or leasing such cars it exercised a right of ownership incidental to its right to manufacture, as much as was that to transport, and it violated no duty to the public such as it would have owed to it if it had acquired property under the right of eminent domain, or had been vested

with a power to do some act for the public benefit, by legislative grant, which it was not competent for individuals to perform.

At the time of the lease the whole capital of the company had been invested in its cars, its patents, and its contracts. Even if it was under an obligation to the State to manufacture, it had performed it by investing in such operation its whole authorized capital. It was at liberty, after it had done this, to sell the property, and it was under no obligation to reinvest the proceeds in further manufacturing.

Even if it had sold all its cars and patents, and had refused to manufacture other cars, and even if such refusal would have been cause for a forfeiture, it was only competent for the Commonwealth, by writ of *quo warranto*, to work such forfeiture. It is not open to any person other than the Commonwealth, to complain that a private corporation deserves a writ of ouster because of its non-exercise of its franchises. Of course, the case is different with a *quasi* public corporation; for there the public have a right to demand that the property which it has acquired under the right of eminent domain, shall be used for the benefit of those whose rights alone justified its grant. This right the court will make efficacious whenever a person in interest asks it so to do.

The distinction between *quasi* public, and ordinary trading, corporations, is one that is much more than hinted at in Thomas *vs.* Railroad Company, and is very clearly stated in the text-books, and in many of the cases.

In Thomas *vs.* Railroad Company it was said by Mr. Justice Miller:—

"Where a corporation, like a railroad company, has granted to it by charter, a franchise intended, in large measure, to be exercised for the public good, the due performance of those functions, being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State and is void as against public policy."

In Pennsylvania Company *vs.* St. Louis Railroad it was also said:—

"We think it may be stated, as the just result of these cases, and on sound principle, that unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises and the exercise of its powers, nor can any other railroad company, without similar authority, make a contract to receive and operate such road, franchises and property of the first corporation, and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter."

In Taylor on Private Corporations, sections 131 and 132, it it said:—

"The general statement is often made that a corporation cannot transfer its franchises to another corporation, or to an individual. Especially, it is said, a corporation cannot transfer its franchises to be a corporation. And this on the ground that a grant of franchises or privileges from the legislature to a body of men gives to that body no authority to transfer these franchises and privileges to others. In effect, such a transfer would be a conferring of power to act as a corporation; a power which, it is needless to say, only the legislature can confer. If a corporation is expressly authorized to transfer its franchises, then its grantee receives them indirectly from the legislature by virtue of express power conferred upon the corporation to authorize another body of men to exercise its franchises or similar ones.

"These statements are all correct enough. The trouble with them is that, except in regard to a single class of corporations, they have little practical import. The class of corporations referred to are railroad and other corporations charged with the performance of public duties, who receive special franchises the better to enable them to fulfill these duties. And in regard to such corporations there is a further reason why it is incompetent for them to transfer their franchises—*i. e.*, the general rule forbidding them to do any act that may put it out of their power to serve the public as they were intended to serve it. But what do the franchises of an ordinary business or manufacturing corporation amount to? To nothing but a legal competency to act in a certain manner, which they have acquired by their complying with certain formalities. There is nothing special or extraordinary about their franchises. In truth, their franchises are hardly worth transferring. Persons acquiring their property by purchase or under foreclosure may readily form themselves also into a corporation, if corporate organization is desired. Unquestionably the particular competency which a body of men by complying with certain statutory provisions have acquired is not transferable to another body who have not

complied with those provisions; any more than may be transferred the competency to act as a limited partnership, which persons may have acquired through compliance with the statute authorizing limited partnerships. Just as in regard to limited partnerships, so in regard to corporations, the general intention of enabling statutes is that persons, who have complied with certain formalities, may act as a corporation; that others may not. It will simplify matters here, as elsewhere, to view them as they practically are; and not to talk vaguely about the incompetency of corporations to transfer their franchises."

In 2 Morawetz on Corporations, section 1025, it is said:—

"There can be no doubt that, if a corporation neglects the performance of any duty or obligation, which it has assumed for the benefit of the public, this is a sufficient cause for declaring a forfeiture of the company's franchises. But all corporations are not under a positive obligation to the State to carry on the business for which they were formed. Thus, ordinary private business companies may at any time put an end to the whole or a part of their transactions, and voluntarily wind up their affairs. Their franchise of acting in a corporate capacity is merely permissive, and not an obligation. Hence, in these cases a forfeiture for non-user of the franchises cannot be based upon a neglect of duty on the part of the company."

In 2 Morawetz, section 1129, it is said:—

"Telegraph, water and gas companies. The doctrine discussed in the preceding sections applies to other corporations than railroad companies. It may be laid down as a general rule, that, whenever the aid of the Government is granted to a private company in the form of a monopoly, or a donation of public property or funds, or a delegation of the power of eminent domain, the grant is subject to an implied condition that the company shall assume an obligation to fulfill the public purpose on account of which the grant was made.

"Thus a telegraph company may be invested by the legislature with the right of taking private property by the exercise of the power of eminent domain. By exercising this power, the company would incur an obligation to give the public the benefit of telegraphic communication over its lines, at reasonable charges; and any act of the company which would disable it from performing its duty to the public would be prohibited by law.

"The same rule applies to companies invested with special privileges at the expense of the public for the purpose of supplying cities with water. Thus, in Lumbard *vs.* Stearns, it was argued that an act of the legislature, incorporating certain persons as an aqueduct company for the purpose of supplying a village with pure water, and authorizing them to take springs, lands, and other rights, under the power of eminent domain, was unconstitutional, because it contained no express provision requir-

ing the company to supply all families and persons who should apply for water on reasonable terms; that the company might act capriciously and oppressively; and that the use for which the power of eminent domain had been granted could not therefore be considered a public one. But the Supreme Court of Massachusetts held that such action of the company would be a plain abuse of the franchise, and that by accepting the act of incorporation they impliedly undertook to perform all the public duties required by it.

"For the same reasons, it follows that a gas company, accepting an exclusive right to lay gas-pipes through the streets of a city, would impliedly assume an obligation to supply gas to all applicants upon the payment of a reasonable price; and the State would have constitutional power to enact laws to secure the rights of the public, by preventing the company from making unreasonably high charges.

In Ardesco Oil Co. *vs.* Mining Co., 66 Penna., 381, Mr. Justice Sharswood said:—

"The remaining errors complained of in the sixth and seventh assignments may be considered together, namely, that the directors of the corporation, plaintiffs, had no power to make the lease sued on. It is supposed that a company chartered for the purpose of manufacturing and refining oil cannot lease its entire property, and so defeat the very purpose for which its charter was granted. But corporations, unless expressly restrained by the act which establishes them, or some other act of Assembly, have, and always have had, an unlimited power over their respective properties, and may alienate and dispose of the same as fully as any individual may do in respect to his own property. Hence, an insolvent corporation may make a general assignment for the benefit of its creditors, and this power may be exercised by the directors, unless special provision to the contrary is made in the charter, Dana *vs.* Bank of the United States, 5 W. & S., 223. If they can alienate absolutely, they may lease, which is but a partial or temporary alienation. *Omne majus continet in se minus.*"

In Gibb *vs.* Balto. Gas Co. it was said:—

"The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort. New Orleans Gas Co. *vs.* Louisiana Light Co., 115 U. S., 650; Louisville Gas Co. *vs.* Citizens' Gas Co., 115 U. S., 683 Shepard *vs.* Milwaukee Gas Co., 6 Wisconsin, 539; Chicago Gas Light & Coke Company *vs.* People's Gas Light & Coke Co., 70 Missouri, 69. Hence, while it justly urged that those rules which say that a given contract is against public policy should not be arbitrarily extended so as to interfere with the freedom of contract, Printing, &c., Registering Co. *vs.*

Sampson, L. R., 19 Eq., 462; yet, in the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interests, courts decline to enforce or sustain contracts imposing such restraints, however partial, because in contravention of public policy. This subject is much considered, and the authorities cited in West Virginia Transportation Co. *vs.* Ohio River Pipe Line Co., 22 West Va., 600; Chicago, &c., Gas Co. *vs.* People's Gas Co., 121 Illinois, 530; Western Union Telegraph Co. *vs.* American Union Telegraph Co., 65 Georgia, 160."

SUBHEAD *B.*

We will now consider whether the lease was *ultra vires* in view of the act of February, 1870.

This act antedates the lease by but a few days, and we may fairly infer that it was passed to set at rest any doubt which might possibly be raised as to the validity of what must then have been under contemplation. The lease, made within a few days after the passage of this act, has continued to be acted upon, without question as to its validity, for sixteen years. By virtue of this lease the Pullman Company has possessed itself of all the property and business of the plaintiff. If the decision of the court below is sustained, it will retain everything that is valuable, and which it could never have acquired but for this lease, and will be obliged to return nothing but worthless cars.

It was thought by the court below that the legislature could not have intended to permit this lease to be made, because it extended the charter of the company for ninety-nine years, and permitted the capital to be increased from $2,000,000 to a total of $2,200,000. It was necessary to extend the charter, which would expire in some twelve years, in order that the corporation might make a lease of longer duration than would otherwise have been possible. The extension of the charter was even more necessary than was the giving of the power to lease and transfer. We can hardly suppose that the authority to add ten per cent. to the capital was conferred because the legislature intended to put upon the company the duty of manufacturing more cars. In point of fact, the capital stock was increased to permit the issuance of a stock dividend. Though there is no evidence of this before this court, it can conceive of many reasons why the capital was permitted to be increased to

so slight an extent without supposing that such permission was meant as a denial of the expressly-conferred right to lease and transfer.

By the act of February, 1870, the company is "empowered to enter into contracts with corporations of this or any other State for the leasing, or hiring, and transfer to them, or any of them, of their railway cars and other personal property."

By another act of the same legislature, passed eight days later, to wit, on the seventeenth day of February, 1870 (P. L., 31), Purdon's Digest, page 1441, it was provided:—

"It shall and may be lawful for any railroad company or companies created by or existing under the laws of this Commonwealth from time to time to lease or become the lessees, by assignment or otherwise, of any railroad or railroads, or enter into any other contract with any other railroad company or companies, individuals or corporations, on such terms and conditions as may be agreed upon, whether the road or roads embraced in such lease, assignment, or contract may be within the limits of this State or created by or existing under the laws of any other State or States."

Under this latter act all the leases of railroad property in Pennsylvania have been made. The power is merely "to lease or to become the lessees of any railroad or railroads," and can hardly be held as being more broad than the power "to lease or hire and transfer the railway cars and other personal property" conferred upon the Central Transportation Company.

In the Pennsylvania Company *vs.* St. Louis Railroad, 118 U. S., 318, the legislature had permitted—

"All railroad companies incorporated or organized under, or which may be incorporated or organized under, the authority of the laws of this State, to have power to make such contracts and arrangements with each other, and with railroad corporations of other States, for leasing or running their roads, or any part thereof, and also to contract for and hold in fee simple, or otherwise, lands or buildings in this or other States for depot purposes; and also to purchase and hold such personal property at shall be necessary and convenient for carrying into effect the object of this act."

This power was held sufficient to authorize an Illinois railroad company to become the lessee, for ninety-nine years of an Indiana railroad.

In Willamette Co. *vs.* Bank of British Columbia, 119 U. S., 191, it was said:—

"A statute which confers upon a corporation the right to take water from a river and to conduct it through canals, and the exclusive right to the hydraulic powers and privileges created by the water, and the right to use, rent or sell the same, or any portion thereof, authorizes the corporation to mortgage such powers and privileges.

"The mortgage commences its granting clause, descriptive of the property conveyed, by saying that the said corporation 'doth hereby grant, bargain, sell, assign, set over and convey unto the party of the second part'—meaning the bank—'its assigns, successors, and representatives, all the following real property lying and being situate in the county of Marion, and State of Oregon, more particularly described, as follows, to wit:' Then follows a minute description by metes and bounds, and courses and distances, of the realty upon which the mill property of the party of the first part now stands. 'The design hereof being to convey the entire parcel of realty, together with the tenements and buildings, together with all and singular the machinery of every kind used therein or thereabout. Also the power to bring water from the Santiam River to any place or places in or near Salem, the same to be brought as far as practicable through the channels of the valley of Mill Creek, and for such purposes may enter upon lands, and also said creek, and do all things proper and suitable for a safe and economical conveyance of water as aforesaid; also the exclusive right of the hydraulic powers and privileges created by the water of the Santiam River; also all the rights and powers of the said party of the first part in and to the water rights, powers, and privileges obtained under its charter or articles of incorporation, including all rights and property of kindred character acquired by the said party of the first part in any way or from any person since the incorporation aforesaid. Also all that tract or parcel of realty upon which the party of the first part has now in operation a sash factory'—giving a full description of it—'together with all the rights of way now owned by said party of the first part as appurtenant to or necessary to the use and enjoyment of said rights, privileges and easements in the waters aforesaid, together with all and singular the tenements, hereditament, and appurtenances thereunto belonging to or in anywise appertaining, &c.'"

"The decree of the court finds' that the defendant corporation, the Willamette Woolen Manufacturing, did have full authority and power to make and execute the mortgage now here sought to be foreclosed, and that it conferred upon the plaintiff corporation, by said mortgage, a lien upon all its right and power under said territorial act, to take water from the Santiam River in and under its franchise touching the taking, carrying and using of said water, and all the rights, privileges, and uses incident thereto,' and orders the sale of the property as mortgaged, unless the defendant company pay the sum of $15,606.51 within thirty days from the date of the decree.

"The right of the corporation to make a mortgage which should cover everything described in this mortgage, under ordinary acts of incorporation, or the provisions usually found in such acts, might be an interesting question. It also admits of doubt whether the mortgagor corporation in this case intended, by the use of the general language found in this instrument describing what was conveyed, to transfer all of the powers, the privileges, and the franchises conferred upon it by its charter. It was, undoubtedly, desirable, in making this mortgage, that if it became necessary to sell under it, the purchaser, in getting the realty, the houses, the mills, the manufacturing machinery, the conduits through which the water-power came to operate upon that machinery, and all the tangible property necessary to the use of that water-power, should also get the privilege of using it; and so far as the privilege of using that particular water appropriated to these mills was a franchise or special grant to the corporation, it was intended to be conveyed in the mortgage. For all the powers which it was necessary to exercise in the use of this water as a manufacturing motive power, the woolen company intended to create a lien upon the property it mortgaged.

"But there were franchises created by the act of incorporation which would be of no value to the purchaser, which, in the nature of things, could not be transferred to it, and which were not intended to be transferred to it. Obviously among these was the right to exist as a corporation. The sale under the decree of foreclosure did not annihilate the Willamette Woolen Manufacturing Company, so that it no longer had any existence, nor was its power to make contracts, to sue and be sued, to have a common seal, to buy other lands and sell them, to make by-laws, and to do many other things which an incorporated body can do, and which are described in the second section of its charter, ended with such sale. Nor is it all clear that, if it had sold outright the property which it mortgaged to this company, it would not still have the right to take other water from the Santiam River and conduct it to other mills and other places for the purposes of manufacture, provided it did not interfere with or limit the water and the use of the water which it had sold.

"It is, however, unnecessary to examine these matters very critically. The charter itself seems to have given unlimited power to the company to sell everything it had, including its exclusive rights to the hydraulic powers and privileges created by the water which it takes from the Santiam River. Such was the express language of the sixth section of the charter. Describing what it is that is granted to this corporation with regard to the water and its use, and, in the same language, what it may do in the way of disposing of it, it says, 'said corporation shall have exclusive right to the hydraulic powers and privileges created by the water which it takes from the Santiam River, and may use, rent, or sell the same, or any portion thereof, as it may deem expedient.'

"There seems to be here no limitation upon the power of the corporation to dispose of whatever it acquired under the statute which called

it into being. Describing in the same sentence that it shall have 'the exclusive rights to the hydraulic powers created by the water which it takes from the Santiam River,' it declares that it 'may use, rent, or sell the same,' which means all of it; and to show that it does mean all of it, there is added after the words 'sell the same,' the further clause, 'or any portion thereof as it may deem expedient.'

"It is hardly necessary to say that this right to sell in these general and strong terms, or to rent, or to use it, must include the power to mortgage it. A mortgage is in effect a sale with a power of defeasance, which may ultimately end in an absolute transfer of the title. This language is, in its nature, inconsistent with the limitation upon the power of the company to transfer its rights and privileges. If there is anything peculiar in the word franchise, it must include in any definition that can be given it, this word 'privileges;' especially when the statute speaks of 'the exclusive right to the hydraulic powers and privileges.'

"As we have already said, it would be unprofitable to go into an inquiry of how far the corporation could have transferred these exclusive rights and privileges to anybody else, and how far it could have divested itself of them and of its power to use them, if no such language had been in the charter. But the supreme legislative power, which had the right to make this corporation, and to which it would be subject more or less in its exercise of the powers conferred upon it, has also said, as it had a right to say, that it may sell these privileges, may part with them, and may transfer them to other persons, and we think this language is sufficient warrant for anything actually conveyed by the mortgage and by the decree of the court."

It was not necessary to secure the passage of the act of February, 1870, to enable the plaintiff to hire its cars to railroad corporations. The right to use, or to hire to others to use, was incidental to that to manufacture. It had been hiring its cars to railroad corporations, as is evidenced by the contracts which it assigned to the Pullman Company, ever since it had been incorporated.

The act of 1870 conferred power to lease or hire and transfer all the cars and personal property of the plaintiff. Is it possible to confer in clearer language a more unlimited power to lease? To lease not a part, but the whole, of the assets of the company. Can we doubt that this act authorized the corporation to change its position from that of owner and possessor of its entire property into that of a lessor entitled to receive from its lessee a rental? Did it not justify the company in turning over to another corporation the right to carry on its

business which it had previously carried on for its own account? It having been held, without question, that a power to lease a railroad justified the company which owned it in transferring, for a term of ninety-nine years, all its property and franchises, how can it be held that a power to lease or hire and transfer all its property, conferred upon a manufacturing corporation of a private character, did not authorize it to lease for a term of ninety-nine years all its cars and personal property to a single corporation? How can it be held that a lease not *ultra vires* in a *quasi* public corporation is illegal when made by a private corporation under a warrant as broad as that which existed in the present case? The act of 1870 put no restriction upon the length of the term of the lease, nor upon the quantity of the property which might be leased and transferred. If it could have been held, before this act was passed, that the plaintiff could not divest itself for a long term of years of the control of all its property, is it possible so to hold after its passage? The object of the act was clearly expressed in its title, namely, "To empower them" (The Central Transportation Company) "to lease their property."

We can hardly believe that the decision of this court in Railroad Company *vs.* Thomas would have been rendered if an act of the Legislature of New Jersey could have been found in phraseology approximating in liberality that which we have quoted. It would not then have been competent for the railroad company to have set up the defense of *ultra vires*, though by such lease it had put it out of its own power personally to operate its railroad or to do aught else than to receive a stipulated rental.

In authorizing a contract of lease, of unlimited duration as to term, the Legislature of Pennsylvania knew that it would be possible for the plaintiff to put into the possession and control of a lessee, all its property then in existence, and which might thereafter come into existence. It knew that thereafter, over such property, the lessor would have no right saving that of collecting a rental. It did not see fit to require that the plaintiff should retain in its own exclusive possession, any por-

tion of its property, or that it should construct other property after it had made a lease of what it already owned. The plaintiff was left free, if it should require more cars, again to lease them. Does not the decision of the court below put upon the plaintiff a restriction which was not imposed by the legislature? Could a corporation authorized to lease its property at the time owned, and such as it might thereafter acquire, be held bound to transport upon its own account?

If there had been a warrant in the legislation of New Jersey for the lease which was made in Thomas *vs.* Railroad Company, would this court have held, because the railroad company, by its charter, might have had a power to build branches, that the lease would have been bad if it had stipulated that it would not do so? Would this court, if such a lease had been otherwise warranted, have held a covenant not to construct such branches bad, because *ultra vires* or in violation of public policy?

II. Did this lease create a monopoly which made it void?

The Legislature of Pennsylvania authorized a lease of all the plaintiff's property to a single corporation, and if, therefore, such a lease did create a monopoly, it was one which was legal. We do not, however, mean to confine our discussion under this head to saying this, although, as we think, it is conclusive upon the question we have put.

It can hardly be said that a corporation having a power to manufacture cars creates a monopoly by selling or leasing such cars to another corporation, especially in a State like Pennsylvania, where it is open to any set of five persons in the Commonwealth, to file articles of association, and to become clothed with the power to manufacture as many cars as they may see fit.

In Morrison *vs.* Barclay Coal Company, 68 Pennsylvania, corporations which controlled, practically, all the output of coal in a large region, entered into a contract to put up prices. This did create a monopoly. It was impossible, however, for the Central Transportation Company to monopolize the manufacture of cars.

An assignment by the Central Transportation Company of

the property which it possessed in 1870, created a monopoly to no greater extent than results from any assignment of a like character by a corporation or an individual. A monopoly results from a contract between persons or corporations practically controlling the supply of an article to restrict or interfere with such supply. A monopoly can never result from an agreement between two persons or corporations having no possible power to control a supply, to consolidate their property by a sale or lease from one to the other.

III. Was the lease contrary to public policy, and therefore void?

It will hardly be held that public policy was violated by the mere transfer of the property which belonged to the plaintiff. The objection upon the ground of public policy can only rest upon the agreement by the plaintiff, "not to engage in the business of manufacturing, using or hiring sleeping cars while this contract remains in full force and effect."

We will argue hereafter that a private manufacturing corporation is not within the meaning of the cases which hold illegal, unlimited contracts in restraint of trade by individuals. We will, first, however, endeavor to show that this covenant was limited, and reasonable under the circumstances which existed at the time it was entered into. We can best do this, we think, by stating, in the words of several learned judges, the law upon the general subject of covenants in restraint of trade, and then by applying such law to the present case.

In Leather Cloth Company *vs.* Lorsont, L. R., 9 Equity Cases, the syllabus reads thus:—

"Although public policy requires that every man shall be at liberty to work for himself, and shall not deprive himself or the State of his labor, skill or talent, it is equally a principle of public policy that a man shall be enabled to sell to the best advantage anything that he has acquired by his labor, skill or talent; and when that advantage requires him to enter into stipulations he may do so, provided such stipulations, however restrictive upon himself, are not unreasonable, having regard to the subject-matter of the contract.

"Upon the formation of a company for the purchase and working of a certain process of manufacture introduced into this country from America, the agreement for the purchase contained a provision that the

vendors 'will not directly or indirectly carry on, nor will they, to the best of their power, allow to be carried on by others, in any part of Europe, any company or manufactory having for its object the manufacture or sale of productions now manufactured in the business or manufactory' (of the vendors) 'and will not communicate to any person or persons the means or process of such manufacture, so as in any way to interfere with the exclusive enjoyment by the purchasing company of the benefits hereby agreed to be purchased.'

"*Held*, That the restriction contained in this clause was not greater, having regard to the subject-matter of the contract, than was necessary for the protection of the purchasers, and was capable of being enforced against the vendors."

It was said:—

"I now come to the question with respect to the covenant, which is a very important one, as seems to me. No doubt the covenant is expressed in very large and full terms, and it is insisted that the mere fact that the covenant is 'not to carry on or allow to be carried on in any part of Europe,' is in itself what is called a general restraint of trade as in a restraint of trade throughout the United Kingdom, and that in that form a restraint of trade extending throughout the United Kingdom is upon the face of it bad, though something short of it may be allowable, provided the circumstances justify it. I do not read the cases as having laid down that unrebuttable presumption which was insisted upon with so much power by Mr. Cohen. All the cases, when they come to be examined, seem to establish this principle, that all restraints upon trade are bad, as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract. The principle is this: Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labor, skill or talent, by any contract that he enters into. On the other hand, public policy requires that when a man has by skill, or by any other means, obtained something that he wants to sell, he should be at liberty to sell it at the most advantageous way in the market; and, in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case, the same public policy that enables him to do that does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation, however restrictive it is, provided that restriction, in the judgment of the court, is not unreasonable, having regard to the subject-matter of the contract.

"Now, in this case, the subject-matter of the contract was a particular manufacture, carried on partly under patents and partly by processes, which, it is to be assumed, were not known, except to the vendors themselves and their agents and workmen. That being the subject-matter

of the contract, the stipulation is, that the vendors will not set up a similar manufacture in Europe, and will not communicate the process of the manufacture anywhere so as to interfere with the enjoyment by the intended company of the benefits thereby agreed to be purchased. This case, as it seems to me, much more resembles the sale of a secret, which has been held to be perfectly good, with a stipulation unlimited as to time and place as to communicating the secret, or dealing with it so as to interfere with the purchaser. It is settled by authority that a man may bind himself not to communicate that process to anybody else anywhere, under any circumstances, in any part of the world. But how would it be possible to enforce such a covenant as that—not to communicate the process—if he were at the same time to be at liberty to carry on that same trade with the same process in such a way that they would have to be communicated to every servant and workman engaged by him in the trade? He is entitled to restrain himself from communicating, and is thereby enabled to get a higher price for that which he is selling. The fact that he is so entitled to restrain himself from communicating the process entitles him also to restrain himself from carrying on the manufacture, which would involve the communication of the process. Independently, therefore, of those words, 'so as in any way to interfere with the exclusive enjoyment,' I am of opinion that there is nothing in this covenant which violates the rules of law, or which is in contravention of the decided cases, when the principles upon which those cases have been decided come to be properly considered. But if there were anything in the covenant so standing which might be supposed to be a contravention of some of the decided cases, I am satisfied that these words 'so as in any way to interfere with the exclusive enjoyment of the company,' do properly and sufficiently modify and qualify it. The principle being that you are not to have any more restraint than is necessary for the benefit of the purchaser; the company say, we do not ask for any unreasonable or capricious restraint upon you: we only ask you to bind yourself not to do something which will interfere with that which you profess to sell to us, and for which you have received the consideration. I am of opinion, therefore, that the covenant is one capable of being enforced in this court."

In Gibb *vs.* Gas Company, 130 U. S., 409, it was said :—

"The decision in Mitchell *vs.* Reynolds, 1 P. Wms., 181; S. C. Smith's Leading Cases, 407, 7th Eng. Ed.; 8th Am. Ed., 756, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but, as it was made under a condition of things, and a state of society different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is, whether, under the particular circumstances of the case, and the nature of the particular con-

tract involved in it, the contract is, or is not, unreasonable. Rousillon *vs.* Rousillon, 14 Ch. Div., 351; Leather Cloth Co. *vs.* Lorsont, L. R. Eq., 345.

"'Cases must be judged according to their circumstances,' remarked Mr. Justice Bradley in Oregon Steam Navigation Co. *vs.* Winsor, 20 Wall., 64, 68, 'and can only be rightly judged when the reason and grounds of the rule are carefully considered. There are two principal grounds on which the doctrine is founded that a contract in restraint of trade is void as against public policy. One is the injury to the public by being deprived of the party's industry; the other is the injury to the party himself being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. It is evident that both these evils occur when the contract is general, not to pursue one's trade at all, or not to pursue it in the entire realm of the country. The country suffers the loss in both cases; and the party is deprived of his occupation, or is obliged to expatriate himself in order to follow it. A contract which is open to such grave objection is clearly against public safety. But if neither of these evils ensue, and if the contract is grounded on a valid consideration and a reasonable ground of benefit to the other party, it is free from objection, and may be enforced.' Innumerable cases, however, might be cited to sustain the proposition that combinations among those engaged in business impressed with a public, or *quasi* public, character, which are manifestly prejudicial to the public interest, cannot be upheld. The law 'cannot recognize as valid any undertaking to do what fundamental doctrine or legal rule directly forbids. Nor can it give effect to any agreement the making whereof was an act violating the law. So that, in short, all stipulations to overturn—or in evasion of—what the law has established; all promises interfering with the working of machinery of the Government in any of its departments, or obstructing its officers in their official acts, or corrupting them; all detrimental to the public order and public good, in such manner and decree as the decisions of the courts have defined; all made to promote what a statute has declared to be wrong, are void.' Bishop on Contracts, section 549; Woodstock Iron Co. *vs.* Richmond and Danville Extension Co., 129 U. S., 643, decided at this term, opinion by Mr. Justice Field; Trust *vs.* Child, 21 Wall., 441; Irwin *vs.* Williar, 110 U. S., 499; Arnot *vs.* Pittston, &c., Coal Co., 68 N. Y., 558; Central Salt Co. *vs.* Guthrie, 35 Ohio St., 666; Woodruff *vs.* Berry, 40 Ark., 251, 261; H. & N. H. Railroad *vs.* N. Y. & N. H. Railroad, 3 Robert (N. Y.), 411; Craft *vs.* McConoughy, 79 Ill., 346; Hooker *vs.* Vandewater, 4 Denio, 434; Central Railroad *vs.* Collins, 40 Georgia, 582; Morris Run Coal Co. *vs.* Barclay Coal Co., 68 Penn. St., 173.

"It is also too well settled to admit of doubt that a corporation cannot disable itself by contract from performing the public duties which it has undertaken, and, by agreement, compel itself to make public accommodation or convenience subservient to its private interests.

"'Where,' says Mr. Justice Miller, delivering the opinion of the court

in Thomas *vs.* Railroad Co., 101 U. S., 71, 83, 'a corporation like a railroad company has granted to it by charter a franchise intended, in large measure, to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions; which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the State, and is void against public policy.'"

In Fowle *vs.* Parke, 131 U. S., 88, where it was said:—

"A contract relating to a patent medicine which communicates its ingredients in confidence, and provides in substance that the parties shall enjoy a monopoly of the sale of it, each within a defined region in the United States, and that it shall not be sold below a certain rate or price, is not unreasonable or invalid as in restraint of trade.

"As we remarked in Gibbs *vs.* Consolidated Gas Company, 130 U. S., 396, 409: The decision in Mitchel *vs.* Reynolds, 1 P. Wms., 181; S. C. Smith's Leading Cases, volume 1, Part II., 508, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things and a state of society different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other requires, the contract may be sustained. The question is whether, under the particular circumstances of the case, and the nature of the particular contract involved in it, the contract is, or is not, unreasonable. Rousillon *vs.* Rousillon, 14 Ch. Div., 351; Leather Cloth Co. *vs.* Lorsont, L. R., 9 Eq., 345; Oregon Steam Navigation Co. *vs.* Winsor, 20 Wall, 64, 68.

"Relating as these contracts did to a compound involving a secret in its preparation; based as they were upon a valuable consideration, and limited as to the space within which the restraint was to operate, we are unable to perceive how the restraint could be regarded as so unreasonable as to justify the court in declining to enforce them.

"The vendors were entitled to sell to the best advantage, and in so doing to exercise the right to preclude themselves from entering into competition with those who purchased, and to prevent competition between purchasers; and the purchasers were entitled to such protection as was reasonably necessary for their benefit. Williams had and transferred property in the secret process of manufacturing the article he had discovered, and he and his grantees could claim relief as against breaches of trust in respect to it. The policy of the law is to encourage useful discoveries by securing their fruits to those who make them. If the public found the balsam efficacious, they were interested in not being deprived of its use, but by whom it was sold was unimportant."

In Leslie *vs.* Lorillard, 110 N. Y., 521, it was said:—

"The averments of the complainant are substantially as follows:—

"The plaintiff is a stockholder of the defendant, the Old Dominion Steamship Company of Delaware. In the year 1873 the Old Dominion Steamship Company of New York, was a corporation organized under the laws of New York, and was engaged in the business of running a line of steamships between the port of New York and certain ports in the State of Virginia. The defendant, the Lorillard Steamship Company, was also a New York corporation, organized for the business of navigating the ocean by steamships. The defendant Lorillard was a director and the president of the Lorillard Steamship Company and had entire control of it; the other directors, except one who was a brother-in-law, being his clerks and employés. In and prior to the summer of 1873, said Lorillard, 'for the purpose of extorting large sums of money from the Old Dominion Steamship Company of New York, stated to the officers of said corporation that the said Lorillard Steamship Company intended to put on and run a line of steamships between the ports above mentioned, in opposition to the steamships of said Old Dominion Steamship Company; and to deceive the officers of said company and cause them to believe that a formidable opposition would be established against said company, said Lorillard caused said Lorillard Steamship Company to lease docks at Norfolk and other places, and to hire agents and servants at different points, and in or about the month of October, 1873, said Lorillard caused said Lorillard Steamship Company to put on and run a line of steamships between said ports in opposition to said Old Dominion Steamship Company of New York.' Said Lorillard continued to run his steamships at great loss and at his own expense, until his efforts were successful in deceiving the officers of the Old Dominion Company into the belief that a powerful opposition line had been established; and in January, 1874, an agreement, running between the Old Dominion Company and Lorillard and his company, was signed by the president of each company, and by Lorillard for himself, by the terms of which, in consideration of a monthly payment to him, Lorillard and his company agreed to discontinue running their vessels, or any others, between the ports mentioned, and that they would not charter or sell the vessels to any other company or person to be used on that route, and would not become in any way interested in the running of steamships between those places; that in February, 1875, the defendants, the Old Dominion Steamship Company of Delaware, was formed under the laws of that State and succeeded to the business of the New York Company, and 'became vested in the property of said last-named company, which was duly conveyed and assigned to it and subjected to the liabilities and contracts of said company.' This new company continued making payments to Lorillard under the contract mentioned, until February, 1878, when disputes arose between the various parties and a new contract was entered into

in October, 1878. By this latter contract the previous contract was canceled, and in consideration of the payment of a gross sum of money and of certain monthly payments, to be continued through five years from February, 1879, Lorillard and his company again agreed not to run or to be in any way interested in the running of steamships between the ports named. The Delaware Company made all the payments called for under the second agreement up to August, 1881, when further payment of the monthly subsidies was enjoined in an action brought by this plaintiff. Plaintiff alleges that prior to the commencement of this action, in February, 1884, he requested the Delaware Steamship Company to pay no more moneys and to commence an action for the cancellation of the contract and for the recovery back of the money paid under the contracts. This demand was in a letter, and the reply to it contains a resolution of the board of directors, refusing to take the action requested. Plaintiff also alleges the commencement of an action in February, 1884, by Lorillard, against the Delaware Company, to recover the monthly payments, payable under the contract from and after August, 1881, and that the Delaware Company did not intend to defend it.

"The relief demanded is an injunction against the Delaware Company's making payment under the contract; against Lorillard from prosecuting his action, the cancellation of the contract, and the repayment by Lorillard of all moneys received.

"Defendants Lorillard and the Lorillard Steamship Company demurred to the complaint on the ground that it did not state facts constituting a cause of action.

"The contracts of corporations are said to be *ultra vires* when they involve some adventure or undertaking not within the scope of their charter, which is the rule of corporate action. In granting of charters the legislature is presumed to have had in view the public interest; and public policy is (as the interest of stockholders ought to be) concerned in the restriction of corporations within chartered limits, and a departure therefrom is only deemed excusable when it cannot result in prejudice to the public or to the stockholders. As artificial creations, they have no powers or faculties, except those with which they are endowed when created; and when, as is frequently the case, they act in excess of their powers, the question will be: Is the act prohibited as prejudicial to some public interest, or, is it an act not unlawful in that sense, but prejudicial to the stockholders? The rule, however, is well settled that the plea of *ultra vires* should not prevail when it would not advance justice, but, on the contrary, would accomplish legal wrong.

"In suits between the corporation and strangers dealing with it, the question is, whether the act is one which the corporation is not authorized to perform under any circumstances; or one that it may perform for some purposes or under certain conditions. In the first case, it is *ultra vires*, and there can be no recovery; because the party dealing with the corporation is bound to know, from the law of its existence,

that it has no power to perform it; in the second case, the issue will turn upon whether the party dealing with it is aware of the intention to perform the act for some unauthorized purpose, or whether the attendant circumstances justify its performance. In actions by stockholders, which assail the acts of their directors or trustees, courts will not interfere unless the powers have been illegally or unconscientiously executed, or unless it be made to appear that the acts were fraudulent or collusive and destructive of the rights of the stockholders. Mere errors of judgment are not sufficient as grounds for equity interference; for the powers of those entrusted with corporate management are largely discretionary.

"Testing by these rules the case made by plaintiff in his complaint, we find, in considering that pleading, that the only respect in which the contracts in question could be viewed as prejudicial to public interests, and, therefore, become the subject of judicial condemnation, as being against public policy, would be that they were in restraint of competition and tended to create a monopoly. The tendency of modern thought and of the decisions, however, has been no longer to uphold in its strictness the doctrine which formerly prevailed in respect of agreements in restraint of trade. The severity with which such agreements were at first treated became more and more relaxed by exceptions and qualifications. This change was gradual and may be considered, perhaps, as due mainly to the growth and spread of the industrial activities of the world, and to enlarged commercial facilities, which render such agreements less dangerous as tending to create monopolies. The earlier doctrine, of course, obtained in respect of agreements between individuals. The limitation which became imposed was, that the agreement should operate as to a locality and not as to the whole land. In later times, the danger in such agreements seems only really to exist when corporations are parties to them, for their means and strength would better enable them to buy off rivalry and to create monopolies.

"The object of government, as interpreted by the judges, was not to interfere with the free right of man to dispose of his property or of his labor; it was to guard society, of which he was a member, from the injurious consequences of his agreement; whether they would arise from his own improvidence in bargaining away his means of gaining a livelihood or in the deprivation to society of the advantages on competition in skilled labor. At the present day there is not that danger, or at least it does not seem to exist to an appreciable extent, except, possibly, as suggested in the case of corporations. In their supervision and in their restriction within the limits of their chartered powers, the Government and the public are directly interested. Corporations are great engines for the promotion of public convenience, and for the development of public wealth, and so long as they are conducted for the purposes for which organized, they are a public benefit; but, if allowed to engage, without supervision, in subjects of enterprise foreign to their charters, or if permitted unrestrainedly to control and monopolize the avenues to

that industry in which they are engaged, they become a public menace; against which public policy and statutes design protection.

When, therefore, the provisions of agreements in restraint of competition tend beyond measures for self-protection, and threaten the public good in a distinctly appreciable manner, they should not be sustained. The apprehension of danger to the public interests, however, should rest on evident grounds, and courts should refrain from the exercise of their equitable powers in interfering with and restraining the conduct of the affairs of individuals or of corporations, unless their conduct, in some tangible form, threatens the welfare of the public. The doctrine relating to contracts in restraint of trade has become elaborately discussed in a careful opinion of Andrews, J., in the recent case of the Diamond Match Co. *vs.* Roeber (106 N. Y., 473). Under the authority of that case it may be said that no contracts are void as being in general restraint of trade, where they operate simply to prevent a person from engaging or competing in the same business. It is there said (page 483): 'To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privileges.'

"Under the doctrine of that case, it is difficult to see how the contracts, which are complained of here, are open to the objection suggested by counsel. Regarded only in the light of what they intended to effect, these agreements removed a business rival, whose competition may have been deemed dangerous to the success or maintenance of the business of the Old Dominion Company. They could not, of course, exclude all competition in the business, but would in that particular case.

"How, then, is the result different from the simpler case of the sale by an individual of his business and of his right to conduct it in a particular part of the land? The doctrine held by this court in Diamond Match Company *vs.* Roeber (*supra*), should control the case at bar, and these contracts, therefore, cannot be considered objectionable on the ground that they restrained competition. Whether competition in this particular business would be a public benefaction, or its restraint a sort of prejudice, we are unable, of course, to judge. I do not think that competition is invariably a public benefaction; for it may be carried on to such a degree as to become a general evil.

"The conclusion at which we have arrived, as to these contracts, would seem to dispose of this case and make further consideration useless; for the plaintiff makes them the basis of his action. The relief he has sought is the prevention of a misappropriation of corporate funds by the officers of the company and the annulment of these contracts as obtained by deception."

In Morse Drill Company *vs.* Morse, 103 Mass., 73, it was held:—

"A covenant made by the patentee of a process of manufacture in a business not local in its character for the purpose of selling the patent to better advantage, and as a part of the transaction of sale, and for one and the same consideration received by him for the patent, to use his efforts to invent improvements in the process and to transfer them to the buyer, to do no act which may injure the buyer or the business, and, 'at no time to aid, assist, or encourage in any manner any competition against the same,' is not necessarily void in restraint of trade.

"The defendant demurs, on the legal ground that his covenants are in restraint of trade, contrary to public policy, and void, and that therefore he has a legal right to disregard them. The principle upon which the defense rests has been much discussed, and, since the case of Mitchell *vs.* Reynolds, 1 P. W., 181, it has been well established in England. It is also well established in this Commonwealth.. See Taylor *vs.* Blanchard, 13 Allen, 370, and cases cited. The question now before us is, whether it extends to a case like the present.

"It has never been extended to a business protected by a patent. Therefore, so far as any interference with the plaintiffs' patents is concerned, the covenants are not in restraint of trade. But it is not alleged that the defendant does infringe their patents; and thus the case does not rest on that ground.

"Nor does it extend to a business which is a secret and not known to the public; because the public has no right in the secret. Bryson *vs.* Whitehead, 1 Sim. & Stu., 74; Peabody *vs.* Norfolk, 98 Mass., 452. All future inventions and improvements which the defendant might make would necessarily be of this character; for if they were not then secret, they would not be new inventions or improvements. Some of them might not be patented, yet the defendant bound himself to use them exclusively for the benefit of the plaintiffs.

"The language of the contract implies that, when the plaintiff joined the defendant in his new business, they had confidence in his mechanical skill and ingenuity, and intended to avail themselves of it for the benefit of the business in which he induced them to embark; and that it was a material part of the consideration for which they paid him so considerable a sum and invested their capital. It was not in restraint of trade, nor contrary to public policy, that the defendant should contract to render the plaintiffs his exclusive services in this respect. This part of the contract he is alleged to have violated. And though the defendant did not technically become a partner with the plaintiffs, yet he became the associate of the other stockholders in the business, he himself inducing them to join him in it, and having a large interest in the formation of the company; and the same principle that enabled a partner to bind himself to do nothing in competition with the business of the firm ought to apply to him.

"In Taylor *vs.* Blanchard, cases were suggested in which the restriction would be valid if it did not extend beyond the limits of the good-will of the business which was the subject of the sale, even if it covered the whole State. In some of the English cases it had been said that the contract was valid unless it imposed some restriction beyond what the interest of the party required. Tallis *vs.* Tallis, 1 El. & Bl., 391; Mallan *vs.* May, 11 M. & W., 653, 667. But in these cases the restriction was local. In former times, almost every species of business that was carried on was of a local character; but there are some recent English cases in which the principle has been considered with reference to business which was not local.

"In Ainsworth *vs.* Bentley, 14 Weekly Rep., 630, the plaintiff had, in 1851, purchased of the defendant 'Bentley's Miscellany,' which was then an established magazine. He took an agreement that the defendant would not publish another periodical of the like nature. In 1865, the defendant entered into an arrangement to become the publisher of 'Temple Bar,' the periodical of a like nature, and within the restriction. It was objected that the agreement was void, being in restraint of trade and unlimited, and that magazine publishing was a trade of itself. But Vice-Chancellor Wood granted an injunction against violating the contract.

"In Stiff *vs.* Cassell, 2 Jur. (N. S.), 348, the defendant agreed with the plaintiff to write two tales for a periodical paper, and that he would not write for any other publication which should be sold for less than a certain price for the space of a year. The restriction was held to be valid, though it had no limitation as to space.

"In Ingram *vs.* Stiff, 5 Jur. (N. S.), 947, a weekly periodical was sold, with an agreement by the vendor not to publish, either alone or in partnership, any other periodical of a nature similar to it. This agreement was held to be valid and was enforced by injunction.

"In these cases the restriction, though extending through the whole kingdom, was obviously no greater than the interest of the vendee required; and, by giving it, the vendor had been able to obtain an enhanced price for what he sold.

"In Leather Cloth Co. *vs.* Lorsont, Law Rep., 9 Eq., 345, a company had been formed for the purpose of working a certain process of manufacture introduced into Great Britain from America. They purchased the right, with an agreement of the vendors that they would not, directly or indirectly, carry on, nor would they to the best of their power, allow to be carried on by others, in any part of Europe, any company or manufactory having for its object the manufacture or sale or productions therein manufactured in the business or manufacture of the vendors, and would not communicate to any person or persons the means or processes of such manufacture, so as in any way to interfere with the exclusive enjoyment by the purchasing company of the benefits agreed to be purchased. It was held that the restraint was not greater, having regard to the subject-matter of the contract, than was necessary for the protection

of the purchaser, and it was enforced against the vendors. The decision acknowledges the principle that contracts are void if their object is to deprive the State of the benefit of the labor, skill, or talent of a citizen. But the court say that on the other hand public policy requires that when a man has by skill or other means obtained something that he wants to sell, he should be at liberty to sell it in the most advantageous way in the market, and, in order to enable him to do this, it is necessary that he should be able to preclude himself from entering into competition with the purchaser, provided the restriction is not unreasonable. He may not have any mere restraint than is necessary for the benefit of the purchasers, but to that extent he may have it.

"In this country there are periodical publications that have a very wide circulation; and it is obvious that a purchaser of a proprietorship cannot afford to pay the full value unless he can obtain from the vendor a valid restriction against competition, which restriction shall be as extensive as his interest requires, though it may cover the whole of a State, or the whole country. The same would be true as to some book. For example, the author of a popular school-book could not sell its proprietorship for its full value unless he could bind himself not to prepare another book which should be used in competition with it.

"The same would be true as to some manufactured articles. The present case furnishes an illustration. The defendant could not have obtained the consideration which was paid him, if it had been understood that this contract, which he has violated, had no validity. He is appropriating to himself a part of that which he has sold to the plaintiffs, and which is valuable property to them. It is unlike the cases where the prohibition extends beyond what the interests of the purchaser require, or is any way unreasonable. The court are of opinion that the contract is valid."

In Davies *vs.* Davies, L. R., 36 Ch. Div., 363, we find a very useful summary of the course of the decisions under this head, made by Justice Kekewich. True it is, that the decree was reversed, and that there were observations made by Lord Justice Cotton adverse to what was stated by Justice Kekewich upon the general subject of restraint upon trade. The observations of Lord Justice Cotton, however, were not adopted by his associates, Lords Justices Bowen and Fry. The latter adhered to what he said in Rousillon *vs.* Rousillon, and the former was very guarded in what was stated by himself upon subject.

Even Lord Justice Cotton admitted:—

"Where there has been a partial restraint only, the court has gone into the consideration as to whether that is reasonable, namely, whether

it is reasonably required for the protection of the party with whom the covenant was entered into. Well, then, has he gone further than that? It is said that there are cases which have laid down that the only thing to be considered in judging whether these covenants can be enforced or not, and whether they are valid or not (for it is not only a question of equity), is to see whether they are reasonable. Warmington contended that the reasonableness required had reference to what was reasonably necessary for the protection of the covenantee; and it is very probable that the first rule I mentioned that absolute covenants in restraint of trade are illegal as was established on the ground that they are not reasonable; and in that sense it may be that what we have to consider is whether they are reasonable; but, in my opinion, if we look at the cases on which Warmington relied, there is this to be observed, that where there has been a limited restraint, and a limited restraint only, then the court has considered, with reference to the validity of that covenant, whether, though the restraint is limited, the restraint is reasonable; and of course that must come in, even stating the rule as I have endeavored to do, namely, that an absolute restraint is bad, but that a limited restraint may be good, provided the restraint is reasonable only, and such as was required for the protection of the person with whom the covenant is entered into. If one looks and sees what are the authorities which have been referred to by Warmington in argument, I think it will be found that they really are cases where the judges, though admitting the general rule, and sometimes doing so expressly, have considered, as regards a partial covenant which was before them, whether the case was one in which the restraint was reasonable."

Lord Justice Bowen, on pages 390 and 391, stated his opinion thus:—

"Now, there may be limitations to be found in the covenants on the strength of which it is sought to escape from this general doctrine. There may be such limits in time, and it has also been the view of the courts that a limit in time is not indispensable in order to enable the covenant to be enforced when there is some other limit to be found which makes the covenant reasonable and necessary for the protection of the party who seeks to protect himself, and those cases I need not discuss further. Then we come to another limit, which may be found, a limit in space—and as yet I think there has been no decision that you may have a covenant unlimited in space altogether, unless in the case of special limits, which form the third class of limits—the limit which is to be found in the special character of the subject-matter which is sought to be protected. The last, or third kind of limit, is a kind of limit which, I think, Vice-Chancellor James thought he had found in the case of Leather Cloth Company *vs.* Lorsont, though in that case, also as the Lord Justice has pointed out, there may also have been found a limitation in time.

"Now, we have been asked by Mr. Warmington, in an extremely able argument, first of all, to hold that limitation in space is not necessary if you can find that protection through an unlimited area of space is reasonably necessary for the security of the covenantee. But Mr. Warmington has not confined himself to that minor proposition, he has also gone further and asked us to consider, generally, whether the state of circumstances, the change in the character of the business of the world, the extension of the means of intercourse between one part of the kingdom and another, and one part of the world and another, has not shaken to its core the original doctrine, that covenants unlimited altogether ought not to be enforced. It appears to me that if there is to be any change made in the principle of the common law, to which I have alluded, and which has remained unassailed for centuries, it would better come from the House of Lords than from ourselves; but if there is to be an exception engrafted, or the rule is to be modified with reference to the requirements of modern society, as to which I will, for the moment, express no opinion, it can only be if the case in question ranges itself under one or two heads: either that the covenant, in its unrestricted form, was one which was a benefit to the public, in which case it might be said that that would destroy the reason for insisting on the old rule, which was derived from the public policy of the kingdom; or, secondly, if it was reasonably necessary for the protection of the covenantee. In the present case, it seems to me that we have got no materials upon which we can, without leaping in the dark, assume that the present covenant is a benefit to the public, for there is nothing, to my mind, which shows that the public would be benefited by allowing such a covenant as this in this case to be enforced, nor have we materials for deciding that such a covenant is reasonably necessary even for the protection of the covenantee. It appears, therefore, to me, that it is not necessary in the present case to consider or decide whether what I have called the old doctrine of the common law, that covenants absolutely unlimited, both in space and in time, ought to be modified, having regard to the altered character of the commercial intercourse of the world."

Lord Justice Fry, on page 398, said :—

"What I mean to indicate is this: That I am not convinced that there is any other rule of limitation, except that the contract shall not be unreasonably large. If it be more than reasonably large then it tends to a monopoly without any corresponding good passing. If, on the other hand, it be not larger than is reasonable, it still seems to me that it would be remarkable that something else should be imposed on the contract, so that the contract would be required to be not only reasonable, but something more. I rather incline to think that every reasonable contract ought to be enforced."

Mr. Justice Kekewich said:—

"Having had occasion not long ago to consult the authorities on covenants in restraint of trade, I found it difficult to state any rules with precision or, to use the language of Chief Justice Parker, 'to reconcile the jarring opinions.' Having now consulted them more at large and with the assistance of counsel's criticisms, I find my difficulty rather increased than diminished. It is the embarrassment of wealth, for the authorities are numerous, and includes decisions of eminent judges and opinions of professors competent to speak. It is not for me to suggest how this embarrassment could have been avoided; still less is it for me to suggest how it can be remedied by a decision of the highest court of appeals, or, if need be, by legislation. I disavow any wish or intention to do more than find, if possible, a guide to the solution of the particular question before me.

"All authorities, from first to last, concur in one thing, viz., that the doctrine on this subject is founded on "public policy;" and I cannot but regard the jarring opinions as exemplifying the well-known *dictum* of Mr. Justice Borrough in Richardson *vs.* Mellish, that public policy 'is a very unruly horse, and once you get astride of it you never know where it will carry you.' Public policy does not admit of definition and is not easily explained. If that statement requires authority, turn to Egerton *vs.* Earl Brownlow, and consult the arguments of counsel and opinions of judges, covering the whole subject, including, in some passages to which I will presently call attention, that part of it which concerns restraint of trade. One thing I take to be clear, and it is this—that public policy is a variable quantity; that it must vary and does vary with the habits, capacities, and opportunities of the public; that it cannot have been the same when Chief Justice Tindal decided in Horner *vs.* Graves, in 1831, as it was when Chief Justice Parker decided Mitchel *vs.* Reynolds, in 1711; that it must have changed, and did change, between 1831 and 1869 when Vice-Chancellor James decided Leather Cloth Co. *vs.* Lorsont; and that if there had not been a further change before Lord Justice Fry decided Rousillon *vs.* Rousillon in 1880, it must have occurred ere now.

"There are many circumstances familiar to us all, and some of them connected with politics rather than with policy, which have materially altered the relative position of rivals in trade and of the public whom traders supply. Railways, electric telegraphs, and telephones have all exercised an influence, and quite recently the parcels post, to say nothing of many other novelties, have introduced new implements into competition. I make these remarks because to my mind they go a long way to explain the difference between earlier and later decisions. Judges have been bound to recognize not merely the old decisions, but the principles on which they were founded, and yet, regarding public policy as the principle overriding all, they have struggled to adapt these older decisions to the changed circumstances of the day. There has, I think,

been a steady though irregular progress from the stricter rules of the last century, and perhaps it has not yet reached its limit.

"According to the old cases, the rule was simple enough, and the reason of it was clear. We have the highest authority for saying that, according to Mitchel *vs.* Reynolds, the general rule was that, all 'restraints of trade which the law so much favors, if nothing more appears, are bad.' In other words, the presumption of law was against them, because the law favored the utmost competition in trade. There are frequent statements in the books that in thus favoring trade the law desired to assist every man to earn his living by that trade for which he was apt; and possibly some judges thought that this was required by public policy, but to my mind what is really meant by the law favoring trade is, that it was considered a matter of essential importance to encourage all men to trade in order that the public might gain advantage by their trading—in other words, it was considered public policy to assist England to become a nation of traders.

"From the first, exceptions to the rule were established. These exceptions are generally accepted as amounting to a doctrine judicially settled, that a covenant in restraint of trade must, in order to be supported, comply with three conditions. They are not always stated in the same order, and I might therefore state them in the order most convenient to myself. They are these: First, the covenant must be made on adequate consideration; secondly, the restraint must be partial; and, thirdly, it must be reasonable. As regards the first, it was laid down in Hitchcock *vs.* Coker, which is regarded by Sir G. Jessel in Gravely *vs.* Barnard as settling the point, that the court cannot inquire into the adequacy of consideration moving a contract between two competent parties. A nominal, that is to say, an unreal, consideration will not suffice: but provided there is real consideration, the court will not inquire further or pause to consider whether the object gained was at all commensurate with the price paid for it, or whether the covenantee really required the benefits for which he stipulated. Hitchcock *vs.* Coker was decided in 1837, and of itself shows a large departure from the original rules.

"Notwithstanding that the two other conditions have, in conformity with many authorities, been above stated separately, I cannot but think that they have and are of late been treated as one. Indeed, I am not sure that some confusion has not arisen from their being treated otherwise. The partial character of supportable restraints of trade may be the most essential feature and evidence of their reasonableness, but I venture to think that it is in truth no more than this, and that, nothwithstanding my *dicta* to the contrary, the authorities for the proposition that a covenant, in order to be supported, must be partial, are better understood if construed to mean that they must be reasonable. I therefore proceed to consider what is a reasonable restraint of trade.

"With three exceptions, which I will presently notice, it has always been held that a covenant, in order to be reasonable, must be limited as regards space. I do not think that I am bound by any authority to hold

that it must be limited as regards persons, and the practical objections to so holding at the present day are obviously greater than those to supporting the necessity of limit as regards space. Collins *vs.* Locke might be cited as against this, but in truth in can better be referred to the class of covenants good for partiality as regards space. A limit as regards persons may, however, be useful towards making a restraint reasonable, as, for instance, not to solicit customers to a firm, within, say, the United Kingdom, might render a restraint reasonable which would not be otherwise. The limit of time is of no value. It enters into some cases, as, for instance, Whittaker *vs.* Howe and Rousillon *vs.* Rousillon, to be presently mentioned, but it was scarcely regarded there, and can seldom, if ever, be the basis of judgment. This is fully explained by Mr. Baron Parke in Ward *vs.* Byrne, and also in a useful contribution to the learning on this subject, which will be found in the notes to Hunlocke *vs.* Blacklowe. There are some other possible limits which might be introduced to make a restraint reasonable, on which I need say no more than that whenever that character can fairly be ascribed to them they deserve favorable consideration. Jones *vs.* Lee is a case of this class. (See the judgment of Mr. Baron Bramwell.) Whittaker *vs.* Howe is the first case in which a covenant unlimited as regards space was upheld. A different conclusion would at least have been as consistent with Horner *vs.* Graves, which was intended to be followed, and, bearing in mind the doubt about this authority, long ago suggested by a note to Mitchel *vs.* Reynolds, in Smith's Leading Cases, and therefore long current in the profession, I should hesitate to treat it as a safe guide, though haply bound by it in a case precisely similar. The next case is Leather Cloth Co. *vs.* Lorsont, where Vice-Chancellor James upheld a covenant by the vendors of a process of manufacture with their vendees that they would not indirectly carry on, or allow to be carried on, in any part of Europe (which, for the purposes of the case, may be read as meaning Great Britain) any company or manufactory having for its object the manufacture or sale of productions then manufactured in the business or manufactory of the covenantors, and would not communicate to any person the means or process of the manufactures so as to interefere with the vendees. This case is important, first, because it is a good example of the class of cases in which covenants in restraint of trade have been connected with the sale of a business or good-will; and, secondly, because the Vice-Chancellor stated the principles guiding him in language different from that employed by any other judge before him, and, I think, implying some departure from the ordinary explanation of the principles of public policy. He does say as much, but I think that he intended to hold that nothing could be against public policy which was reasonable, and that nothing could be unreasonable which, according to the experience of mankind, was prudently required to secure to a purchaser the exclusive enjoyment and benefit of that which he had contracted to purchase, and for which he had paid the consideration stipulated by the vendor. He contrasts freedom of con-

tract with freedom of trade, and shows that both are equally the favorites of public policy. The passages in his judgment to which I refer will be found on pages 354 and 355.

"The same contract was strongly insisted on in the third case, Rousillon *vs.* Rousillon, where Lord Justice Fry (then Mr. Justice Fry) sustained a covenant by the agent of a firm of champagne merchants not to establish himself with other persons or houses in the champagne trade for ten years in case he should leave their employment. Lord Justice Fry rested his judgment on the contract just mentioned, and held to be sound a rule extracted from Mallan *vs.* May, that the defendant, alleging the invalidity of a contract on the ground that it is in restraint of trade, has cast on him the burden of showing it to be clear that the protection extends beyond what the plaintiff's interests require. He further examined the alleged rule that a contract, if good, must be limited as to space, and held in the result, that the cases in which an unlimited prohibition has been spoken of as void relate only to circumstances under which such prohibition has been unreasonable. This seems to me to accord with common sense, and, if so, it ought also to accord with sound law. I can well understand, notwithstanding Whittaker *vs.* Howe, that the inhabitants of, say, Cornwall or Cumberland ought not to be deprived of the services of a local solicitor practicing, say, in Bodmin or Carlisle, because he was formerly a clerk in the employ of a solicitor or a member of a firm of solicitors practicing, say, in London or Birmingham. And to take an illustration from a business which has been singularly fruitless in contributions to this branch of the law, it would be difficult, I think, to hold that the inhabitants of a country town, even within a moderate distance from London, should not enjoy the advantages of a resident banker, because he happened to have been a partner in or connected with a bank established in the metropolis, and not having branches in the provinces. On the other hand, there are many trades which can be carried on by correspondence and by means of modern facilities of transit with such ease, and with such advantages both to trader and customer, that it would be difficult, if not impossible, to say what corner of the kingdom could not be well served from any other corner; and it is within the knowledge of all that many who, from early associations or for some other reason, prefer goods supplied at a particular place, continue to deal with tradesmen there, notwithstanding that they have, from accident or chance, removed their home many miles away. Is there anything to prevent me from adopting the rule which is laid down by Lord Justice Fry, and which approves itself to my mind? True it is, that in many cases the old rule is quoted and followed without a hint of disapproval, and the earlier authorities are treated as in full force and applicable to modern circumstances. An example of this class of cases is Collins *vs.* Locke, already mentioned, which, being a decision of the Privy Council, is entitled to special respect; but, though the judgment in that case was rested on Horner *vs.* Graves and other old authorities, it is explained to be based on considera-

tion how the rule ought to be applied to a particular trade in a particular locality, or, in other words, how far the restraint in question could be treated as reasonable or otherwise, having regard to the protection required by the covenantees and the interest of the public. (See, among other passages, one on page 688.) In Egerton *vs.* Earl Brownlow, the law was laid down as having regard to the question under consideration, might be expected in a broader manner. On page 87, Mr. Justice Cresswell states the rule to be, that unreasonable contracts in restraint of trade violate the policy of the common law, that trade shall not be restricted, and are, therefore, illegal. Mr. Baron Parke's remarks are more favorable to strict adherence to the lines of the old cases, but Lord St. Leonards dwells on the variable character of public policy, to which I have already called attention. I need not refer in detail to more of the authorities cited at the bar, or to any of the additional authorities which I myself have consulted. The recent decisions in America, as well as in England, are collected in Mr. Frederick Pollock's work on contracts. He states the doctrine of them as tending to be, that the real question is, in every case, whether the restriction imposed is commensurate with the benefit conferred, and this is only another mode of expressing the test whether the contract is reasonable. The American doctrine, which he states, seems to be substantially the same. I have not thought it worth while to refer to the cases, but they will be found mentioned in Story on Equity Jurisprudence, and also in Parsons on Contracts. I prefer, to any language used elsewhere, that of Lord Justice Fry in the case above cited: In order to apply to it the particular case I must mention a few facts:—

In Rousillon *vs.* Rousillon, L. R., 14 Ch. Div., 363, Mr. Justice Fry says:—

"In the next place, it is said that the contract is not reasonable, and it is unquestionably the law of this country that contracts of this description, being in restraint of the freedom of trade, must be reasonable.

"Now, what is the criterion by which the reasonableness of the contract is to be judged? I will take the law on that point from the language of Chief Justice Tindal, in delivering the judgment of the Court of Exchequer Chamber, on appeal from the Court of Queen's Bench, in Hitchcock *vs.* Coker. He said: 'We agree in the general principle adopted by the court, that, where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void.' That passage was adopted by Lord Wensleydale, when a Baron of the Court of Exchequer, in delivering judgment in Ward *vs.* Byrne, and therefore the rule so expressed has the authority of the Courts of Queen's Bench, Exchequer and Exchequer Chamber

If, therefore, the extent of the restraint is not greater than can possibly be required for the protection of the plaintiff, it is not unreasonable.

"Another case which, in my view, throws great light upon this question, is Tallis *vs.* Tallis. There the plaintiff and the defendant had been partners as publishers of books. Part of their trade, called the canvassing trade, consisted in publishing books in numbers, and employing travelers to sell such books by canvassing for purchasers. The partnership was dissolved, the plaintiff being the continuing partner. The defendant agreed, amongst other things, not directly or indirectly to be concerned in the canvassing trade in London, or within one hundred and fifty miles of the General Post Office, nor in Dublin or Edinburgh, or within fifty miles of either, nor in any town in Great Britain or Ireland, in which the plaintiff or his successors might at the time, have an establishment, or might have had one within the six months preceding. The action was for a breach of the covenant. It was pleaded, amongst other things, that there were numerous works which the plaintiff did not publish, and had no intention of publishing; and that many of such works might be published by the defendant with advantage to the public, and without injury to the plaintiff; that the canvassing trade applied to all such books; and that the restraint, as to the canvassing trade as applicable to such books, was unreasonable. The court, upon those pleadings, and upon a demurrer, held that the declaration was good, it not appearing that the restraint was unreasonable. And in giving judgment they considered a *dictum* in Mitchel *vs.* Reynolds to the effect 'that wherever such contract *stat indifferenter* and for aught appears may be either good or bad, the law presumes it *prima facie* to the bad.' But, instead of adopting that view, they called attention to what was said by the Court of Exchequer in Mallan *vs.* May, 'that it would be better to lay down such a limit as, under any circumstances, would be sufficient protection to the interest of the contracting party, and if the limit stipulated for does not exceed that, to pronounce the contract to be valid.' And further on, in their judgment they said this: 'Even if the facts therein' (in the pleas), 'stated are taken to be admitted by the demurrer, and that the reasonableness of the restriction in question is to be considered with reference to those facts together with the facts alleged in the declaration, still we think the pleas bad. For, although the books capable of republication may be almost infinite, still the number of subscribers to such republications coming out in numbers is limited; and although if the defendant's books are excluded, it does not follow that the plaintiff's books would be purchased, still we cannot ascertain that the number of subscribers to the plaintiff's books would not be diminished if the defendant competed with him by offering other books, especially if they were of a similar character. And, unless the defendant made it plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion, or that the public interest would be sacrificed if the defendant's intended publications are excluded, according to the general rule before referred to, we ought not to hold

the contract void.' In other words, the Court of Queen's Bench threw upon the defendant, who alleged the invalidity of the contract on this ground, the burden of showing that it was plainly and obviously clear that the protection extended, by the proposed exclusion of the defendant's publications, beyond what the plaintiff's interests required. And such, in my opinion, ought to be the rule of law upon this point, because the defendant is seeking to put a restraint upon the freedom of contract, and he who does that, must, I think, show that it is plainly necessary for the purposes of the freedom of trade. I adopt the views expressed by the Master of the Rolls in Printing and Numerical, &c. Company *vs.* Sampson, as to the necessity of courts being careful how they invade the freedom of contract.

"The question then arises, does the defendant in the present case discharge the burden so cast upon him? In answering that, I must consider the facts of the case. It appears that at the time this contract was entered into, the defendant had for some two years been acting as the representative of the plaintiffs in England. His custom appears to have been under their directions to travel over all parts of England and over Scotland, and at a subsequent date he visited Holland for the purposes of their trade. He had by a residence of some four months in Epernay at the house of the principal plaintiff acquired a knowledge of the plaintiff's trade as carried on in France. He was, therefore, acquainted with the trade at both ends. He was a relative of the plaintiffs, and bore their name. Looking, therefore, at the extent of the trade carried on by the plaintiffs, and its diffusion over the whole of England; looking at the facilities which now exist for carrying on trade in various places by means of the freedom of communication which exists between them, I cannot say that it has been made plain and obvious to me that this contract exceeds in its extent that to which the plaintiffs were entitled for the protection of their trade. No doubt criticisms may be made on the contract, and it may be said that you can conceive cases to which the restraint would apply in which no injury would be done to the plaintiffs. But that observation would have applied to Tallis *vs.* Tallis, and when I bear in mind the devious channels through which trade is influenced, and the great difficulty of providing for every possible case for which injury might arise, without including possible cases in which injury might not arise, I have come to the conclusion that it has not been shown that this contract is larger than is necessary for the reasonable protection of the plaintiffs, and I hold, therefore, that this objection fails.

"But then it is said that, over and above the rule that the contract should be reasonable, there exists another rule, viz., that the contract shall be limited as to space, and that this contract be in its terms unlimited as to space, and, therefore, extending to the whole of England and Wales, must be void.

"Now, in the first place, let me consider whether such a rule would be reasonable. There are many trades which are carried on all over the

kingdom, which by their very nature are extensive and widely diffused. There are others, which, from their nature, and necessities, are local. If this rule existed, it would afford a complete protection to the latter class of trade, whilst it would prohibit complete protection of the former class, and an injury which ought not to be wrought without good reason would arise. In the next place, the rule, if it existed, would apply in two classes of cases. It would apply where the want of a limitation of space was unreasonable and also where it was reasonable. Now, in the former class of cases, those in which the universality was unreasonable, the rule would operate nothing, because the ground is already covered by the rule that the restraint must be reasonable. It would, therefore, only operate in cases in which the universality of the prohibition was reasonable—that is, it would only operate where it ought not. For the existence of such a rule I should require clear authority.

"In the next place, the rule is pressed upon me as an artificial rule, an absolute rule, or, as it was called by the late Vice-Chancellor Wickens, a hard and fast rule. Such a rule might always be evaded by a single exception. No exception may be said to be colorable to a rule of this description, because you can only judge whether an exception be colorable or not by the principle of the rule, and if the rule be really an artificial one without principle, there is no criterion for saying whether the evasion is colorable or not. It appears to me for these reasons, that I ought not to hold such a rule to exist unless it be clearly established.

"How, then, stand the authorities upon the point? There are, undoubtedly, cases in which it has been said that the restraint must not be universal. Such are Ward *vs.* Byrne, and Hinde *vs.* Gray; but looking to the judgment in those cases, and reading them with a view to the subject-matter, they appear to me to relate only to cases in which the universality is unreasonable, and more than once, in Ward *vs.* Byrne the rule is so explained, although I candidly admit that you may select other passages in which the court seems to say that the universality is of itself an objection to the contract. Undoubtedly, Vice-Chancellor Wickens, of whose judgment I can never speak without the highest respect, came to the conclusion that such an artificial rule existed, and he so expressed himself in Allsopp *vs.* Wheatcroft. He said, that 'there has been a natural inclination of the courts to bring within reasonable limits the doctrine as to these covenants laid down in the earlier cases, but it has generally been considered in the later as well as in the earlier cases, that a covenant not to carry on a lawful trade, unlimited as to space, is, on the face of it, void. This seems to have been treated as clear law in Ward *vs.* Byrne, and in Hinde *vs.* Gray, and in other cases; and the rule, if not obviously just, is, at any rate, simple and very convenient. No doubt, in the case of Leather Cloth Company *vs.* Lorsont, Lord Justice (then Vice-Chancellor) James threw some doubt on the existence of a hard and fast rule, which makes a covenant in restraint of trade invalid, if unlimited in area.' There are earlier cases than the one before the Vice-Chancellor James which seem to me to be incon-

sistent with the existence of the hard and fast rule. In Whittaker *vs.* Howe, a case relating to an attorney's business, it is stipulated that the business should not be carried on in any part of Great Britain for twenty years; again, in Jones *vs.* Lees, the covenant was against selling a particular article anywhere in England without the invention of the plaintiff applied to it, and the objection that the covenant was unlimited as to space was taken. 'It is objected,' said Mr. Baron Bramwell, 'that the restraint extends to all England; but so does the privilege. The cases with respect to the sale of a good-will do not apply, because the trade, which is the subject-matter of the sale, is local, and therefore, a prohibition against carrying it on beyond that locality would be useless.' In other words, the learned judge explains the inclination of the courts against the universality of a prohibition as applying only to cases where the subject-matter of the sale was itself local. That is just the view I take of the earlier cases. Still more important are the observations of Lord Justice James, in Leather Cloth Company *vs.* Lorsont, where he undoubtedly came to the conclusion that no such rule had been laid down as had been insisted on before me. Having referred to the cases, he says: 'I do not read the cases as having laid down the irrebuttable presumption which was insisted on with so much power by Mr. Cohen. All the cases, when they come to be examined, seem to establish this principle, that all restraints upon trade are bad, as being in violation of public policy, unless they are natural and not unreasonable for the protection of the parties in dealing legally with some subject-matter of the contract.' I have, therefore, upon the authorities, to choose between two sets of cases, those which recognize, and those which refuse to recognize this supposed rule, and for the reasons which I have already mentioned, I have no hesitation in saying that I adhere to those authorities which refuse to recognize this rule, and I consider that the cases, in which an unlimited prohibition has been spoken of as void, relate only to circumstances in which such a prohibition has been unreasonable. It follows, therefore, that, in my judgment, the plaintiffs have established their right upon the contract to an injunction, the terms of which I will mention presently.

"There is no absolute rule that a covenant in restraint of trade is void if it is unlimited in regard to space.

"The question in each case is whether the restraint extends further than is necessary for the reasonable protection of the covenantee. If it does not do that, the performance of the covenant will be enforced, even though the restriction be unlimited as to space.

"If an agreement contrary to the policy of the English law is entered into in a country by the law of which it is valid, an English court will not enforce it.

"The policy of the English law in favor of trade applies to foreigners trading in England equally with English subjects."

See a careful note to this case defining the course of American authority in XIX. American Law Register (N. S.), 761.

See also the case of Webster *vs.* Buss, 61 New Hampshire, 40.

In Brewer *vs.* Lamar (S. C. of Georgia), 18 Central Law Journal, 54, it was held:—

"An agreement by a vendor of a patent medicine 'never to use or permit his name to be used on any preparation which could be used for the same purposes' as the medicine in question was used and sold for, is in partial restraint of trade only, and, being reasonable, will be enforced by equity by injunction."

In Hagg *vs.* Darley, 47 Law Journal, N. S., Ch. Div., 567, it was said:—

"The defendant sold to plaintiff a business of manufacturing and selling the 'Government Carbolic Disinfectants,' the process of manufacturing which was a secret in his possession, and covenanted not to carry on the business of a manufacturer of the Government Carbolic Disinfectants, or of any other article or thing of a disinfectant nature, for fourteen years, and not to disclose the secret for the same period. The plaintiff brought this action, alleging that the defendant was infringing those covenants and seeking to restrain him. The defendant delivered a statement of defense, whereby he specifically denied that he was infringing the covenants, and further demurred on the ground that the covenant not to carry on such business was in restraint of trade and too general in its provisions.

"*Held*, that, having regard to the subject-matter, the covenant was not too general, and that demurrer must be overruled."

In Printing Co. *vs.* Sampson, L. R., 19 Eq., 465, it was said:—

Now, it was said on the part of the defendant, that such a contract as that which I have mentioned, a contract by which an inventor agrees to sell what he may invent, or acquire a patent for before he has invented it, is against public policy, because it would discourage inventions; that if a man knows that he cannot obtain any pecuniary benefit from his invention, having already received the price for it, he will not invent, or if he does invent will keep it secret and will not take out a patent. It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall

be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract. Now there is no doubt public policy may say that a contract to commit a crime, or a contract to give a reward to another to commit a crime, is necessarily void. The decisions having gone further, and contracts to commit an immoral offense, or to give money or reward to another to commit an immoral offense, or to induce another to do something against the general rules of morality, though far more indefinite than the previous class, have always been held to be void. I should be sorry to extend the doctrine much further. I do not say there are no other cases to which it does apply, but I should be sorry to extend it much further."

In Mackinnon Pen Company *vs.* Ink Company, 48 N. Y. S. C. Rep., 16 J. & S., 442, it was said:—

"S. and B., the owners of the entire capital stock of a certain manufacturing corporation and its patents, agreed to sell the business and patents to F. C. & C., and accept as part of the purchase-price notes of the company, with an agreement by said purchasers that they would remain trustees of the company for a definite period of time, and would maintain in the company assets equal to all its liabilities, including said notes. As an inducement to this guaranty, the vendors covenanted that neither of them would engage in business in opposition to the company to which the patents were conveyed, so long as said purchasers should remain such trustees.

"*Held*, That the covenant of the vendors was not against public policy and void as being in undue restraint of trade.

"When one of said covenantors becomes the owner of most all the stock of another company of which he is the manager and only acting officer, an injunction will go against said company in a proper case to restrain it from acts constituting a breach of said covenant.

"It is a breach of said covenant for such last-named company, in pursuance of a fraudulent advertising scheme, to give away with the goods sold by it, an article similar, and by such company advertised to be equal to that manufactured and sold by said first-named company under its patents.

"Appeal by plaintiffs from an order of the special term denying their motion for a continuance of an injunction during the pendency of the action.

"The Court:— * * * 'The only remaining question, therefore, is, whether the covenant is valid in law. The learned judge who denied the motion for the continuance of the injunction during the pendency of the action, placed his decision on the sole ground that the covenant referred to was void as against public policy, because it was in restraint of trade. In this, I think, he erred. The true reason why contracts in general restraint of trade are repudiated as contrary to public policy, is

that they deprive the public of the enterprise and skill of one of the parties without any corresponding benefit to the party contracting for such restriction. In such a case the contract injures one party without benefiting the other. Whenever, in a given case, the reason of the rule fails, the rule fails with it. Thus it is well settled that an agreement in partial restraint of trade, restricting it within certain limits or times or confining it to particular persons is valid, if founded upon a good and valuable consideration.'

"The test of the reasonableness of any restriction is, whether it is such as only affords a fair protection to the party in whose favor it was made, and at the same time does not militate against public interest. * * * The covenant in the agreement in suit is expressly limited to such acts as shall be in opposition to the plaintiff corporation. The defendants are under no restraint of trade in any place or in any manner, so long as they respect the good-will of the business for which they have been paid. Besides, the covenant is expressly limited as to persons, namely, so long as the individual plaintiffs remain trustees. It is a reasonable protection to the plaintiffs and the restraint of the covenantors is not larger than is necessary for the protection of the covenantees. * * *"

In Baines *vs.* Geary, L. R., 35 Ch. Div., 156, it was said:—

"It has been argued on behalf of the defendant that the covenant not to serve or interfere with the customers of the plaintiff Baines or his successors is too extensive, and Rannie *vs.* Irvine was relied on. In that case the assignor of a lease and the good-will of the business of a baker agreed, that he would not, during the term assigned, solicit the custom of, or knowingly supply bread or flour to any of the customers then dealing at the premises, without the consent of the assignee. There the covenant was held to be good, but an observation made by Tindal, C. J., in his judgment is relied upon. He said, 'The names of the customers would all appear on the defendant's book, and the restraint was virtually limited to a given number of persons ascertained and agreed upon by the parties at the time.' It is argued that, unless the covenant is limited to the persons who were customers of the plaintiff Baines at the time when it was entered into, or, at any rate, who became such during the period of the defendant's employment, it would be too extensive. The terms of the covenant in the present case are no doubt larger than those of the covenant in Rannie *vs.* Irvine, and it is said that they are too extensive, and that, therefore, the covenant must fail altogether. It is quite clear that a covenant in restraint of trade is good, if it does not go further than is necessary to give reasonable protection to the person who imposes it. There is nothing illegal in such a covenant, but it is considered unreasonable if it imposes a larger restraint than is necessary for the protection of the covenantee. The courts have, however, seen their way to treat such a covenant as divisible, and to enforce it the extent to which it is reasonable, while declin-

ing to enforce such part of it as is unreasonable. There are many reported cases in which covenants in restraint of trade have been held to be divisible as regards space. I will refer only to one, Price *vs.* Green.

In a note to Mandeville *vs.* Harman, XXVI. Am. Law Reg. (N. S.), it was said:—

"The covenant under consideration is a contract in restraint of trade. Such is the designation universally applied to such engagements. And no principle of law is more generally recognized than that a contract which precludes a person from the right to employ his talents, his industry, or his capital in any useful undertaking, is void. Whether the restraint be general or partial, Mr. Justice Bronson says, the law starts out with the presumption that a contract in restraint of trade is void, and it is only by showing that the contract is good that this presumption will be rebutted. The rule is, not that a limited restraint is good, but that it may be good. It is valid when the restraint is reasonable, and the restraint is reasonable when it imposes no shackle upon the one party which is not beneficial to the other. Ross *vs.* Sadgbeer, 21 Wend., 166. The authorities are uniform that such contracts are valid when the restraint they impose is reasonable, and the test to be applied in determining whether the restraint is reasonable or not, prescribed by Chief Justice Tindal in Horner *vs.* Graves, 7 Bing., 735, and uniformly adopted in subsequent cases, is this: to consider whether the restraint is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and so large as to interfere with the interest of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either. It can only be oppressive; and, if oppressive, it is, in the eye of the law, unreasonable and void, on the ground of public policy as being injurious to the interests of the public. The rule, as thus stated, is the law of this State. Chief Justice Beasley, in pronouncing the judgment of the Court of Errors and Appeals, in Brewer *vs.* Marshall, 4 C. E. Gr., 537, said: 'And so far has this principle (that contracts in restraint of trade are void) been carried that even in cases in which the restraint sought to be imposed is only partial, it has been repeatedly held that such an agreement will be void unless it be reasonable, and that no such agreement can be reasonable in which the restraint imposed on the one party is larger than is necessary for the protection of the other.' This is the rule by which the validity of the covenant on which the complainant relies must be tried."

As a result of all that we have quoted we think it may be said that the question for the court to determine when a contract in restraint of trade is presented to it, is not is there some restraint, for every contract implies some restraint, but whether or not the restraint is a reasonable or an unreasonable

one under the circumstances. All other standards by which to measure the matter must fail. The text-writers and the annotators of cases upon this subject all admit that to this the courts have come. Some restraint of trade is certainly permitted. An unreasonable restraint is not. All questions of extent, of time, and of space are but questions of reasonableness. If the business to be protected is local, a local restraint is sufficient; but if it be general and widespread, the protection must be broad enough to cover.

Let us now, in the light of what we have quoted, consider the present case.

Was it not a reasonable provision in favor of a lessee, who was obliged to pay for the use of one hundred and nineteen cars a rental of $264,000, that his lessor should not be at liberty to manufacture other cars, nor to offer them to persons to whom the lessee would be obliged to go in order to obtain the income with which to pay this rental?

Can we say that the territory covered by the restraint was too great, when the business was one which extends over a continent?

The plaintiff was not authorized to manufacture cars generally; but simply to manufacture them in accordance with certain specified letters patent. A patent is a monopoly, and the assignee, by the fact of the assignment, must exclude the assignor from the further conduct of the patented business. The lessor was only permitted to transport passengers in cars manufactured in accordance with its patents. It was authorized to transfer these patents, and it did transfer them. Thereafter only its assignee would be able to manufacture under those letters. The transfer of the patents, which it was permitted by the legislature to make, rendered it impossible for it to manufacture any more cars. If there had been no covenant that it would not do so the inhibition upon it would have been equally great. If it had manufactured other sleeping cars, under other patents than those specified in its charter, it would have done so without warrant of law. The Pullman Company may have feared that it would indulge in this authorized manufacture; or that it might procure some additional au-

thority from the legislature. What, therefore, it required the lessor should undertake not to do was something which it was not at that time authorized to do. Was this in violation of public policy? Even if it be illegal for a corporation to agree not to exercise powers which it does possess, it certainly cannot be illegal for it to agree that it will not apply to the legislature for the grant of additional powers. No public policy can be involved in such an agreement.

We have seen, by the cases we have quoted, that the assignor of a patent may agree not to engage in the manufacture by some other process which will interfere with that of the patent. In the present case, however, the plaintiff did not go so far, because, as it was only authorized to manufacture under the patents which it assigned, there was no authority in it to do what it covenanted it would not do.

The cars which were transferred were "sleeping cars," and it was this class of cars only which the plaintiff undertook not to manufacture, or use, in the future. It is not practically possible for the sleeping-car business to be transacted on any one railroad by several rival companies. It is one which the railroad company may carry on by itself; or it may call in the assistance of those who are better able to manufacture the cars of the peculiar character which it requires. If these other parties exact too great a price, the railroad company is not powerless, for it may build for itself. The agreement recites that it will be for the good of the community that a corporation shall furnish to the railroad companies the cars that it may need in such a way as will permit a continuous transit, without break, over long distances. Can this court determine that this will not be for the benefit of the public? Can it say that it will be for the public benefit that the traveler who starts from one city in a sleeping car shall be obliged, at the dead of night, to leave one car and enter another, because another car company has a monopoly of the new line? If the present lease be held illegal, it will also be unlawful for the owner of a manufactory to lease it for a long term of years, for a large rental, under an agreement by which he binds himself that so long as the term continues and the rent is

paid to him he will not build another manufactory which will so interfere with the first by supplying two where only one is needed, that the rental cannot be continued to be paid.

In our case the entire corporate capital had been invested in the cars and patents which the plaintiff was allowed to lease. It was not bound to invest the rental in the purchase of new cars. If it did not so invest, it would not be possible for it to be in the possession of funds with which to build new cars. In agreeing that it would not procure additional capital and would not invest the same in the purchase of new cars, it did not violate any charter duty, even if the reception of the franchise had imposed upon it some duty to invest its capital originally in the manufacture of cars.

In most of the cases reported the relief which was refused was to specifically enforce, or to recover damages for the breach of, contracts by the party who by his covenant agreed to restrain his future exertions. In these, and in all other cases, the court has struck down a covenant in unlimited restraint of trade without reason; because (1) of the right of the covenantor to earn his livelihood, and (2) of the right of the public to the exercise of his industry.

It is not necessary to protect the covenantor in a case like the present, where its livelihood is provided for by the payment of a very large rental during the whole term of the restriction.

Has the public a right in the continued conduct of its business by a corporation, such as makes it illegal for it to agree not to continue it? If it has, the remedy is by ouster, not by confiscation in favor of the covenantee.

Corporations consist of an association of individuals who contribute their capital for the furtherance of a common purpose. So far as these members are concerned, no covenant by the corporation restricts their use of their individual capital in any way it may please them. The covenant by the corporation affects only the future use of the capital which has been contributed to it. Under the laws of Pennsylvania it may dissolve at any time upon application to the court, without reason. If it may dissolve, why may it not agree not to continue its business, where there is no duty upon it as the condition of a

privilege of which it retains the benefit, without incurring any other risk than the possible action of the court upon a writ of *quo warranto?* Certainly a corporation which is authorized to turn over by way of lease, and transfer, to another corporation, all its property, may agree that it will do nothing inconsistent with the lease which it is authorized to make, and thereafter it will remain under no obligation to the Commonwealth to contribute to the welfare of the community by a further investment of capital. A legislative power to lease all the property of a corporation carries with it the right to do whatever will induce a person to become the lessee, especially to agree not to do what, if done, would render the lease worthless.

IV. Was not the contract so executed on the first day of July, 1886, as to entitle the plaintiff to sue for the rent which fell due up to that day, even if the contract was contrary to public policy?

In Thomas *vs.* Railroad Company it was said:—

"It remains to consider the suggestion that the contract, having been executed, the doctrine of *ultra vires* is inapplicable to the case. There can be no question that in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or properly changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred. In regard to corporations the rule has been well laid down by Comstock, C. J., in Parrish *vs.* Wheeler, 22 N. Y., 494, that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it. But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely, with four or five years of action under it, the accounts have been adjusted and each party has received what he was entitled to by its terms."

In Oregon Navigation Company's Appeal, 130 U. S., the suit was for a semi-annual rental, payable in advance, for a period which had only commenced to run after the property had been surrendered.

We have numerous cases in which it has been held that after the contract has been executed it is not competent for a cor-

poration which has received the benefit of the execution to set up the defense of public policy, especially where it is not *ultra vires* for the corporation which sets up the defense to pay.

In Woodruff *vs.* Erie Railway Company, 93 N. Y., page 613, it was held :—

"RUGER, Ch. J.:—

"By leave of the court the plaintiff has brought this action against the defendants, upon a claim accruing upon a lease of the property of the Erie and Genesee Valley Railroad Company, executed by him in 1871 to the defendant, the Erie Railway Company, to require its receiver to pay out of funds in his hands applicable to such purposes, for the use of the leased property, during its occupancy and enjoyment by such receiver in the years 1875, 1876, 1877, and 1878.

"The receiver, upon being requested by the plaintiff to pay rent, first claimed that the conveyance by which the plaintiff acquired possession of and an interest in the Erie and Genesee Valley road was *ultra vires*, and that the title thereby claimed by the plaintiff as well as that attempted to be conveyed by him to the Erie Railway Company was invalid and imposed no legal obligation upon him.

"This fact, instead of leading, as it would be supposed, to a surrender by the receiver of the property thus claimed to be illegally held by him, merely led to a refusal to pay the rent reserved in the lease to the Erie Railroad Company.

"We do not consider it necessary in this case to determine the question whether a lease by a railroad corporation of its property and privileges to an individual is *ultra vires* or not, as we think it is well settled by authority that a grantee in such a conveyance, at least so far as the contract has been executed, is estopped from contesting the title of his lessor or the validity of the conveyance by which he has acquired possession of the leased property. (Platt on Leases, 57, 58; Vernam *vs.* Smith, 15 N. Y., 327; Ingraham *vs.* Baldwin, 9 *Id.*, 45.)

"The estoppel which binds the tenant, also binds all who claim through or under him, and no just reason can be alleged why any distinction should be made between the conveyances in evidence, which were respectively made to and by the plaintiff Woodruff. (Taylor's Landlord and Tenant, sections 89, 90, 91, 705, and 657; Archbold's Landlord and Tenant, 219.) Not only do we consider the principles of law governing the relations of landlord and tenant applicable to this case, but the general principles of equity relating to the respective rights and liabilities of parties arising out of contracts between individuals and corporations, which have been partially or wholly performed by either party, preclude them respectively from raising any questions as to the power of the corporation to make such contract.

"There is a manifest distinction between cases arising under contracts which are contrary to public policy or *mala in se* or *mala prohibita*, and those which are claimed to be *ultra vires* alone.

"This question has been so fully and ably discussed in this court in the case of Bissell *vs.* Mich. S. & N. I. R. R. Co. (22 N. Y., 258), and Whitney Arms Co. *vs.* Barlow *et al.* (63 *Id.* 62; 20 Am. Rep., 504), by Judges Selden, Comstock and Allan—that it would be a work of supererogation to attempt to add anything to the argument there advanced.

"The principles determined in the case of Whitney Arms Company *vs.* Barlow seems to control every view which may be taken of the respective rights and liabilities of the parties in this case. Judge Allen there says: 'A purchaser who acquired by contract, and under an agreement to pay for it, the property of a corporation, cannot defeat the claim for the purchase right by impeaching the right of the corporation to become the owner of the property. One who has received from a corporation the full consideration of his engagement to pay money, either in services or in property, cannot avail himself of the objection that the contract thus fully performed by the corporation was *ultra vires*, or not within its chartered privileges or power. It would be contrary to the first principle of equity to allow such a defense to prevail in an action by the corporation. It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* where the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and the contract. If an action cannot be brought directly upon the agreement, either equity will grant relief or an action in some other form will prevail. The same rule holds *e converso*. If the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate power of the corporation.'

"These propositions are supported by the numerous authorities cited by the learned judge, and meet our full approval.

"We have thus arrived at the conclusion that, so far as the defendants are concerned, the contracts between the plaintiff and the several railroad companies must be treated as valid contracts, binding upon the defendant, the Erie Railway Company, and enforceable against the receiver of such corporation so far as he has assumed their obligations, acting within the authority of the order creating such receivership."

In Camden and Atlantic Railroad Company *vs.* May's Landing Railroad Company, 48 N. J. Law Reports, page 559, it was held:—

VAN SYCKEL, J.:—

"This was an action of debt brought in the Supreme Court to recover the rent alleged to be due from February, 1881, to June 1st, 1882, on a lease of its road executed in 1873 by the defendant in error to the plaintiff in error, for the term of nine hundred and ninety-nine years. The May's Landing and Egg Harbor road was built under a charter obtained

in 1871, and since its completion in 1872, it has been in the possession of the Camden and Atlantic Company as lessee, until February, 1881, at which time the latter company ceased to operate it, and refused to recognize the validity of the lease.

"The defense to the action is rested upon the want of power in the lessee company to execute the lease.

"The Camden and Atlantic Railroad was completed from Camden to Atlantic City in the early part of 1862, under a charter granted in 1852. This road I will hereafter, for brevity, style the main line, and the May's Landing and Egg Harbor Road the branch road.

"The branch road rests its own authority to make a lease, and the authority of the main line to accept a lease upon the seventeenth section of the charter of the branch, which provides that the said branch road is authorized to lease its railroad to, or consolidate with, any other railroad company which is thereby authorized to take such lease and operate the same for such time or times, and on such terms as the said parties may agree upon. This language is unquestionably broad enough to confer upon both companies the power requisite to enter into a valid contract for a lease, and no doubt could arise in this case if the powers of one railroad company can be amplified by provision in the charter of another.

"The title of the act incorporating the branch road is: 'An act to incorporate the May's Landing and Egg Harbor City Railroad Company.' Under the clause of our State Constitution which provides that 'to avoid improper influences which may result in intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title,' can the seventeenth section of the branch road charter be upheld so far as it purports to confer additional franchises upon other railroads? It seems to me to be very clear that this question must be answered in the negative.

"This charter manifestly embraces two distinct objects; it confers power upon the branch road to construct its line and to lease it, and attempts to enlarge the authority of all other railroad corporations by permitting them to accept the lease. There is no indication in the title that such legislation was contemplated. Constitutional restraint could not be invoked for a more salutary purpose than to suppress a scheme to amplify corporate powers in a way which effectually conceals the intention to do so. Jersey City *vs.* Elmendorf, 18 Vroom, 283.

"So far as the grant of authority to the main line is concerned, the seventeenth section is unconstitutional. The necessary power to the main line, if it exists, must be sought for in its own charter.

"The Camden and Atlantic Railroad had no authority under its charter to build the branch road from May's Landing to Egg Harbor City, but, as before stated, did not exercise that right, the branch road having been constructed under a charter subsequently granted in 1871.

"In Branch *vs.* Jessup, 106 U. S., 468, Mr. Justice Bradley held that

the power granted to a railroad company to construct a particular line of railroad carried with it by implication the right to purchase such line of railroad subsequently built by another corporation. The doctrine, I think, is sound, and the right to lease for nine hundred and ninety-nine years would co-exist with the right to purchase. This would establish the power of the main line to enter into the lease if the right to construct the branch had survived until the lease was executed. But by reference to the seventeenth section of the charter of the main line (Pamphlet Laws, 1852, page 271), it will be observed that its power in this respect expired by limitation on the first day of August, 1862. The section reads as follows: 'That if the said railroad shall not be completed and in use at the expiration of ten years from the first day of August next ensuing, that then and in this case the act shall be void.'

"Under the rules which apply to the construction of legislative grants of power, the only interpretation which this language will reasonably bear is that the authority derived through the charter must be exercised within ten years from August 1st, 1852, and that such portion of the road as should not then be constructed could not thereafter be built under the granted authority.

"In Morris and Essex R. R. Co. *vs.* Central R. R. Co., 2 Vroom, 205, it is expressly adjudged that a power of a corporation to take the land of an individual is determined by the expiration of the term limited for its exercise, after which the right of eminent domain derived from its charter no longer exists in the company.

"The branch road was not constructed until the year 1871, nine years after the expiration of the time limited to the main line for the enjoyment and exercise of its granted powers. At that time, the main line, having no longer the right of eminent domain, was without the power to build the branch road, and consequently in the loss of that authority is involved the depreciation of all power which would flow from it. It must therefore be conceded that the execution of the lease on the part of the Camden and Atlantic road was *ultra vires*.

"The rule is well settled, both in England and in this country, that an executory contract, *ultra vires*, cannot be validated by the acquiescence of every stockholder of the company. It is also generally conceded that an *ultra vires* contract fully executed cannot be receded from. Field on Corp., sections 263, 264; Green's Brice's Ultra Vires, 371, 372, 373; 1 Wood on Railroads, sections 171, 172, 173; Thomas *vs.* Railroad Co., 101 U. S., 71.

"The courts have differed upon the question whether the plea of *ultra vires* is available by a corporation in an action brought against it for not performing its side of the contract, where the transaction is complete, and nothing remains to be done by the party seeking relief.

"Ashbury Railroad Co. *vs.* Riche, 7 H. of L., 653, is the leading English case.

"The company, by its directors, entered into an agreement with Riche to give him the construction of a railway from Antwerp to Tournay.

After Riche had entered upon the work, and executed it in part, the company repudiated the contract as *ultra vires*.

"Riche then brought an action to recover damages for breach of contract.

"The case was referred to a barrister to state a special case, and the question of *ultra vires* was that on which the decision was to depend. The court was to be at liberty to draw inferences of fact. In the Court of Exchequer two of the three judges were of opinion that the plaintiff should have judgment, and when the case came before the Exchequer Chamber it was heard before six judges, who being equally divided in opinion, the judgment was affirmed. On appeal to the House of Lords, the judgment was reversed, pronouncing the contract *ultra vires*, and declaring it was without the power of the shareholders to validate it by their acquiescence. Mr. Justice Folger, in 78 N. Y., 187, distinguishes the English case on the ground that the contract with Riche was prohibited by an act of Parliament. Although the court did not rest its decision on that ground, Lord Chelmsford adverted to that fact to distinguish the case of Spachman *vs.* Evans and Evans *vs.* Smallcomb, where the act of the directors was not prohibited by the statute, but was merely not warranted by the deed of settlement of the company. In affirming the judgment now under review it is not necessary to dissent from the conclusion reached in this case. The agreement with Riche was not fully executed on either side, and it was one in which payment to him of the money he had expended in behalf of the company under the agreement, would have done complete justice. The suit being for damages for breach of the contract, would have embraced profits which might have resulted from its execution. If the suit had been maintained it would have given the plaintiff a measure of relief greater than was necessary to restore him to the *status* he occupied before the contract was made.

"In Parrish *vs.* Wheeler, 22 N. Y., 494, Chief Justice Comstock, in delivering the opinion of the court, said that a corporation cannot defend itself against a claim for money paid at its request to one who advanced the price of a steamboat purchased for it, on the ground that the purchase was *ultra vires*, although the plaintiff when he paid the money, knew all the facts. He declared that corporations, like individuals, in dealing with other parties, must live up to the rules of common honesty.

"In the previous case of Bissel *vs.* Michigan Southern R. R. Co., 22 N. Y., 258, the same learned judge expressed the view that where a corporation has received the consideration of its unauthorized contract, and restitution will not do complete justice, the other party may sue directly on the contract.

"He said that the plea of *ultra vires*, according to its just meaning imports, not that the corporation could not make the unauthorized contract, but that it ought not to have been made. Such a defense, therefore, rests upon a violation of trust or duty towards the shareholders,

and is not entertained where its allowance will do a greater wrong to innocent third parties. The acquiescence of the shareholders in the abuse will prevent the interposition of such a plea. This case was decided without an expression of opinion by a majority of the court on this point, but in the later case of Kent *vs.* Quicksilver Mining Co., 78 N. Y., 159, Judge Folger delivered the opinion, in which the entire court concurred, giving the fullest approval to the views of Chief Justice Comstock, in the cases cited. The case was one in which the directors had done an act which the company had no power to do, and in which there was no full execution on both sides. It was not of that class of cases where an authorized act was executed in an unauthorized manner. The transaction was clearly *ultra vires*, and in that aspect it was dealt with by the court. The English and American cases were cited, and the case was ably and elaborately argued.

"The propositions maintained by the court were that acts of a corporation are not, *per se*, illegal, *malum prohibitum*, or contrary to public policy, but which are *ultra vires*, affecting only the interest of stockholders, may be made good by the assent of shareholders, so that strangers to them, dealing in good faith with the corporation, will be protected in reliance on those acts.

"That it needed not that there be an express assent upon the part of shareholders to work an equitable estoppel upon them. When they neglect to promptly and actively condemn the unauthorized act, and to seek judicial relief after knowledge of it, their acquiescence will be presumed.

"That when the public is concerned to restrain a corporation within the limit of the power given to it by its charter, an assent of the stockholders to the use of unauthorized power will be of no avail.

"In Whitney Arms Co. *vs.* Barlow, 63 N. Y., 62, the Court of Appeals of New York, enforced the *ultra vires* contract against the other party where it had been performed on the part of the corporation. In addition to the estoppel, which in this case applied to the person dealing with the company, it is true that none of his rights were infringed by the fact that the transaction was *ultra vires*, the company, and he could not, for that reason also, interpose that defense. But where shareholders are chargeable with consenting to an undertaking which they have permitted to be executed, they waive their pre-existing rights which would be affected by the unauthorized act, and become equally subject to the estoppel.

"Chief Justice Ruger, in Woodruff *vs.* Erie Railway Co., 93 N. Y., 609, in an opinion from which there is no dissent, gave his full approval to the previous cases, and held that under an *ultra vires* lease the lessee is estopped from questioning its validity in an action to recover the stipulated rent.

"In Bradley *vs.* Ballard, 55 Ill., 413, Chief Justice Lawrence said, that when the contract is executed the doctrine of estoppel is applied for the purpose of compelling corporations to be honest, in the simplest and

commonest sense of honesty, and after whatever mischief may belong to the performance of the *ultra vires* act has been accomplished. The case was one in which money was borrowed and notes given by a corporation to enable it to prosecute a business which the lender knew it had no right to undertake.

"In Terry *vs.* Eagle Lock Co., 47 Conn., 141, the Eagle Lock Company entered into an unauthorized agreement with another company to purchase its stock and run it as a separate company. The Connecticut court held that after the contract had been executed, and the defendant company had been permitted for five years to transact business under the arrangement, it could not be interfered with.

"In McCutcheon *vs.* Steamboat Co., 13 Pa., 13, a foreign corporation had taken a lease of real estate without authority in its charter, and in an action for the rent the court enforced the contract.

In Darst *vs.* Gale, 83 Ill., 137, the Peoria Marine and Fire Insurance Company executed a deed of trust to secure payment of certain bonds upon which the company had received the money. The bill was filed to enjoin the trustee from selling the premises and to declare the deed of trust void. The court refused to allow the plea of *ultra vires* to prevail, on the ground that a private corporation cannot be heard in such a defense where the contract has been performed by the other party, and the corporation has had the benefit of the contract and the performance. The language of Chief Justice Lawrence in Bradley *vs.* Ballard was recited with approbation: 'That it would be pressing the doctrine of *ultra vires* to an extent that can never be tolerated, even though the lender knew that the corporation was transacting a business beyond its corporate powers, provided the business itself was free from any intrinsic immorality or illegality.'

"These views were reaffirmed in Ward *vs.* Johnson, 95 Ill., 215, and in Peoria Road *vs.* Thompson, 103 Ill. ,187.

"In Ammermann *vs.* Niles, 9 C. E. Green, 13, the chancellor refused to entertain the defense of *ultra vires* to a mortgage executed by a corporation to secure a debt to the defendants.

"Thomas *vs.* R. R. Co., 101 U. S., 71, is relied upon by the plaintiff in error. In that case the lease was held to be *ultra vires*, and therefore void.

"Mr. Justice Miller, for the court, referred to the English cases, and said that, although the American cases were conflicting, the preponderance of authority was that an extra *vires* contract but partly executed could not be enforced. He, however, held the lease there to be contrary to public policy, for the reason that the lessor company had no power to make the lease, and that thereby it disabled itself to perform the duties which it had undertaken in accepting its charter from the State, and he therefore treated the contract as one forbidden by the law. He did not question that the lessee would be liable for the rental for the period in which it had enjoyed the term.

"It is to be observed in this case that by the surrender of the lease

the lessor was left in his former position, and, the rental being paid, no apparent injustice was done.

"In the case of the Mutual Life and Fire Ins. Co. *vs.* McKelway, 1 Beas., 133, the defendant was unsuccessful in his attempt to recede from his contract, but it was not a suit by one of the parties to the unauthorized contract to enforce it against the other. The proceeding was instituted in behalf of corporators, as to whom the learned jurist who decided the case was careful to observe, that it did not appear that they insured upon the faith of the *ultra vires* contract, or that they became corporators after the contract was entered into, or in consequence of it.

"In the conflict of judicial decisions on this subject, this court may adopt, and should adopt, the rule which will produce the best results in the administration of justice. In my judgment, the true rule is, that when the transaction is complete, and the party seeking relief has performed, on his part, the plea of *ultra vires* by the corporation which has acquiesced in it is inadmissible in an action brought against it for not performing its side of the contract in all those instances where the party who has performed cannot, upon rescission be restored to his former *status*.

"In the cases maintaining a contrary doctrine the reasoning of the courts has been :—

"1. That corporators might by ratifying corporate acts by their acquiescence, indefinitely extend and amplify their granted powers.

"2. That consent on the part of those to do an act which they have no power to do cannot make it legal.

"3. That to hold that an act performed in executing a void contract makes all its parts valid, is to say that the more that is done under an unauthorized contract, the stronger is the claim to its enforcement by the courts.

"To the first objection a sufficient answer is that the State may interpose its authority at any time and compel abandonment of the act in excess of power, and, if need be, revoke the charter of the company for its usurpation.

"When the State challenges the legality of the transaction the paramount and only question is whether it has bestowed upon the company the requisite authority to engage in it. When the question arises between the company and the other party to the contract, other legal principles apply in determining whether the contract shall be observed. It will be admitted that where there is an absence of authority on the part of a corporation to do an act, the requisite power cannot be imported by the transaction either by the consent of stockholders or by the execution of a contract by the other party to the agreement. The contract must necessarily continue to be *ultra vires*. No such affect has been attributed in any of the cases to acquiescence or unilateral performance. The basis upon which the enforcement of the contract in such cases rests is that the company is estopped from setting up its own unauthorized act, and its own incapacity, to evade performance on

its part, after receiving the fruits of the bargain. The power of the company is not amplified, the agreement is none the more legal, in the sense that there was authority to execute it; the court simply refuses to entertain the defense, which common honesty forbids the company to make. A man may become bound by the act of an unauthorized agent and be held liable to the contract made for him; not on the ground that the agent in fact had any authority, but for some conduct on the part of the alleged principal which precludes him from raising the question of authority.

"No reason is perceived why the rules of fair dealing, which are so rigorously applied to natural persons, shall not pertain as strictly to private corporations. No instance is known where a natural person can set up in his own behalf and for his own advantage his want of authority to do an act for which he has received the consideration from the other party. Transactions which are immoral, illegal, forbidden by statute, or contrary to public policy, are not embraced in this discussion; they cannot furnish the basis for a legal cause of action.

"Why is it that *ultra vires* contracts are recognized as unassailable, and are permitted to stand as the foundation of rights acquired under them, after they have been executed on both sides? Such execution imparts no additional power to the corporate body. It does not transmute the negative into the positive. The absence of power is as apparent after as before performance. Why is it that corporations are compelled to pay money borrowed in excess of authority, and to pay the stipulated rent for premises unlawfully leased for the period of occupation?

"The law does not imply a contract to pay the bondholders the money thus received. It is illogical to say that the law will imply a contract by the company which it has no power to make for itself. A contract cannot be implied where an express contract cannot be made. The law recognizes the obligation; it precludes or estops the attempt to evade it. Apply to it what legal phrase you may, the underlying principle is that the corporation cannot set up its own infirmity when it is unconscionable to do so. The law forbids the defense on account of the flagrant injustice which would otherwise be done. The question of corporate power is not entertained.

"To enable recompense to be had to this extent, the contracts are respected, not because they rest in authority, but because good conscience requires it.

"How, then, can recognition of the estoppel be denied where the contract has been executed on the one side, and the party performing cannot, upon rescission, be restored to his former *status?*

"Why should the corporate body be permitted to plead its own wrongful act, and set up its own infirmity as to a bar to the recovery by the other party of what it should in right and justice be accorded?

"It is true that a person cannot, by his own act, acquire a right against another; the other must, in some way, bind himself. The ac-

quiescence in the contract, in virtue of which the other party performs, and the acceptance of its benefits, constitute the binding acts and raise an estoppel. I am unable to see how, upon a just conception of the legal principles involved, a different rule can be applied where the corporation has acquiesced in the contract, and the other party, by performing on his part, has been led into a position from which he cannot be extricated.

"Misconception arises from failing to distinguish between those rights which parties acquire as between themselves, and the rule by which corporate authority must be measured and limited when the State interposes to assert its prerogative.

"Nor does the liability of the company rest upon the doctrine of ratification.

"In its ordinary legal acceptation ratification applies to such contracts as a party has authority to make. Repeated affirmations of a contract by one who has no authority to enter into it, cannot supply the requisite authority.

"But acquiescence in it, upon which the other party acts, may, and does, upon settled legal principles, preclude the parties from starting the question of power as between themselves. There is, in fact, a subsisting contract actually executed in due and legal form, which, under the rule stated, is unimpeachable, except at the instance of the State. It is thus, in legal contemplation, impressed with the vigor and incidents of a valid contract as between the parties, and there is no difficulty in enforcing it in a suit at law.

"It is like the case of one who makes, in legal form, a conveyance of real estate which he has no power to convey, and not like the case where the true owner fails to do some act which may operate as an equitable estoppel to his setting up his title against the person who has been misled by his conduct. In the former case the grantee could maintain an action at law against the grantor to recover possession of the premises granted. In the latter case relief must be sought in a court of equity.

"But whether the rule which I have formulated shall be applied to this case or not, the judgment below should, in my opinion, be affirmed, upon the ground that the lease in this case must be regarded as substantially a contract as fully executed on both sides as those unauthorized contracts in which money has been loaned to or work done for a corporation, for which it has issued its bonds to the creditor.

"The agreement was entered into November 3d, 1871, between the Camden and Atlantic Railroad Company and the May's Landing and Egg Harbor City Railroad Company, in and by which it was agreed that if the latter company would construct the branch road in a specified manner, on or before the first day of July, 1872, the former company would guarantee the bonds of the latter company to the amount of $37,500, to be used in the construction of the said road, and take a lease for the same when completed for nine hundred and ninety-nine years for a specified rental.

"In pursuance of this agreement the bonds were issued by the branch road and guaranteed by the main line. The road was built under the direction of the main line, and the lease executed.

"Every term of this agreement on both sides has been fulfilled, and the agreement, in all respects, substantially executed.

"The annual report of the directors of the main line to the stockholders for the year ending December 31st, 1871, recited the terms of this agreement in detail.

"Annually thereafter, until 1879, the existence of the lease, and the income and disbursements incident to the operation of the branch were duly reported to the stockholders of the main line, during all of which time no attempt was made to avoid the lease.

"We must impute to the stockholders of the main line utter neglect of their affairs, if we say that they did not have notice of the agreement to build the branch road, and of the lease executed in pursuance thereof.

"The only reasonable inference from the circumstances proven is that they had knowledge of the transaction, and that it was engaged in and consummated with their approval and acquiescence. This case presents all the features which have led the judicial mind, in the cases cited, to establish the distinction between executory and executed contracts, in which respect it essentially differs from the Thomas Case, in 101 U. S. This was not, as in the case in the Federal court, the mere leasing of a road owned by the lessor, where the repudiation of its terms would restore both parties to their former *status*.

"Here the lessor built the road, not for itself, but at the instance of and for the lessee, with the proceeds of bonds guaranteed by the lessee to promote and effect the scheme. The branch road was a mere instrument in the hands of the main line to consummate the undertaking.

"By the clearly expressed contract of the parties the road was to be the road of the lessee, the lessor to have only the fixed rentals.

"The lessor has fulfilled every term of its agreement, and put the lessee in possession of all that it stipulated for. Nothing remains on the part of the lessor to be done. We must look at the substance of things in applying legal principles. The lease for nine hundred and ninety-nine years is practically an absolute transfer of the road to the lessee, and the rental a mere mode of paying the lessor for the work done and money expended in constructing the road for the lessee, instead of paying a fixed principal sum. The case does not, in effect and substance, differ from what it would have been if the main line employed the branch road to construct the branch at a stipulated price, and had issued its bonds in payment, after completion and acceptance of the work.

"All the cases concede that under such circumstances the contract must be treated as executed.

"If the contract had been to compensate the branch road for the work, by the bonds of the main line securing the payment of an an-

nuity for nine hundred and ninety-nine years, and those bonds had been delivered, would it be asserted that it was, in substance, the less an executed agreement? It is the merest verbiage and form, whether it is termed a lease securing a rental for nine hundred and ninety-nine years, or a bond securing an annuity for a like term.

"The injustice and inadmissibility of permitting the main line to repudiate its bonds after it has been in occupancy of the road for more than seven years, because the road proved to be unprofitable, would not be more glaring than the inequity of the defense interposed here to the payment of the rental. The work undertaken to be done was fully executed by the branch road, and the manner in which it is to be paid for is immaterial, so far as the principle involved is concerned. There is no consideration of justice and fair dealing, which, in the case referred to, led to the rejection of the offer by the corporations to set up their own incapacity in avoidance of their just obligations, which is not most forcibly presented by this case. It cannot, in the application of legal principles, be dissociated from executed contracts without disregarding the reasons which lie at the foundation of the rule. If the lease is subject to the defense of *ultra vires* the guarantee of the bonds is also incapable of enforcement, and thus loss will likewise fall upon those who advanced money, upon the faith of the guaranty, to be used under the direction of the lessee, and for its purposes.

"If such a doctrine is established, who can answer for the solvency of our insurance companies, savings banks, and money institutions?

"It is a matter of common knowledge that corporate bodies, in many instances, through misconception of their powers or otherwise, have exceeded the legal limits of their authority.

"An action to enforce against the main line its guaranty of these bonds could not be classed with those cases in which companies have been required to return the money they had received on *ultra vires* contracts, or to pay rentals for the period of occupancy.

"If the invalidity of the contract, and the right to repudiate it, be conceded, the law cannot raise an implied obligation on the ruins of the contract upon which to found a recovery. The liability of the defendant upon the bonds must rest, if it exists at all, upon the contract of guaranty.

"The money was not paid to the main line, but to the obligor of the bonds, and no obligation can be implied on the part of the defendant to repay it. The validity of the guaranty contract must be affirmed, or no action can lie against the defendant.

"In the destruction of the contract there must be an entire absence of legal liability.

"The legal doctrine which must be invoked to maintain an action by the bondholders on the guaranty, will support the judgment in this case.

"The doctrine of estoppel by acquiescence, in cases which present the characteristics which appear here, can work no inequity, for it may

safely be presumed that the parties to be affected by an engagement are competent to determine what will best promote their own interest, and for any error in judgment they, and not others, should suffer.

"The contrary doctrine, affording so easy an escape from the consequences of their acts, invites them to overstep the boundaries of their authority.

"There can be no dissent from the assertion that good faith and honest dealing unite in forbidding that the defense here set up shall be successfully interposed. In my opinion, the law is against it, and the judgment below should be affirmed."

In Railway Company *vs.* McCarthy, 96 U. S., 267, it was held:—

"Corporations are presumed to contract with their powers. The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong. Union Water Co. *vs.* Murphy's Flat Fluming Co. *et al.*, 22 Cal., 620; Morris Railroad Co. *vs.* Railroad Co., 29 N. J. Eq., 542; Whitney Arms Co. *vs.* Barlow *et al.*, 63 N. Y., 62. There is no conflict in the evidence as to the terms of the contract. It is all one way, and leaves no room for doubt."

In San Antonio *vs.* Mehaffey, 96 U. S., 315, it was held:—

"The securities issued were within the latter category. If that clause were wanting, we should have no difficulty in holding that the city was, under the circumstances, estopped from denying their validity. The doctrine of *ultra vires*, whether invoked for or against a corporation, is not favored in the law. It should never be applied where it will defeat the ends of justice, if such a result can be avoided. Whitney Arms Co. *vs.* Barlow *et al.*, 63 N. Y., 62.

"Where a corporation has entered into a contract which has been fully executed on one part, and nothing remains for it to pay the consideration-money, it will not be allowed to set up that the contract was *ultra vires*.

In Oil Creek R. R. *vs.* P. T. Co., 83 Penna., 116, it was held:—

"2. The Oil Creek and Allegheny Valley River Railroad Company agreed to pay the Pennsylvania Transportation Company and Oil Pipe Line a certain sum per barrel on all oil transported by it, in consideration that the pipe line would deliver all the oil under its control to the railroad company for transportation. The pipe line performed its part of the agreement, and brought suit to recover the price agreed on. *Held*, that the railroad company could not set up as a defense that the contract was *ultra vires*.

"3. Whether the railroad company might rescind the contract for the future, on the ground that it is *ultra vires*, not decided.

"4. In this case the court held that there was evidence enough of an alleged agreement to modify an existing contract to justify submitting the question to a jury."

Mr. Justice Paxson, delivering the opinion of the court January 2d, 1877, said:—

"There are twenty specifications of error in this case. They raise, however, but two substantial questions, viz.: (1.) Was the contract upon which the plaintiffs were allowed to recover *ultra vires?* (2.) Was such contract found by the jury upon sufficient evidence? Neither proposition presents a question of serious difficulty. It does not appear to have occurred to the defendants below that the contract of July 26th, 1871, was *ultra vires* until it became apparent that, by their subsequent modification of it they had made a bad bargain. They then attempted to repudiate the modification and fall back upon the original agreement of July 26th. Yet the illegality, if any existed, was to be found in the original contract; assuming that to be legal, the modification of it was equally so. We do not think the defendants are in a position to defend upon the ground of the illegality of the contract. There were mutual covenants and mutual advantages. The defendants had enjoyed the advantages, such as they were. To the extent of the demand in this suit, the contract was executed, and to say now that it was *ultra vires* comes with an exceedingly bad grace from the defendants. It may be that having shown performance of their part they would have a right to rescind the contract as to future transactions upon the ground of its illegality. Upon that ground we express no opinion. But there is no rule of law which permits them to retain both the benefits and the price. So far as the contract of these parties may be said to be against public policy and transgressive of their respective charters, there is ample remedy. There is a mode by which the Commonwealth may call a corporation to account where it violates its charter or the rights of the people. The rights of the Commonwealth are in no manner involved in this suit. In regard to the second proposition, we think there was sufficient evidence to justify the court in submitting to the jury the question of the subsequent modification of the contract of July 26th. Nor can we say that their finding was not warranted by the evidence. While some of the specifications of error in regard to the admission of evidence are not entirely free from doubt, we perceive no sufficient error to justify us in reversing upon this ground, especially in view of the fact that the defendants acted upon the modification and settled for one month upon that basis."

It is stated by Waterman on Corporations, page 606:—

"It ill becomes the defendants to borrow from the plaintiff $1000 for a single day to relieve their immediate necessities, and then turn around

and say, we will not return you this money, because you had no power by your charter to lend it. Let them first restore the money, and then it will be time enough for them to discuss with the sovereign power of the State of Connecticut the extent of the plaintiff's chartered privileges." Parker, J., in Steam Nav. Co. *vs.* Weed, 17 Barb., 378. * * * Green's Brie's Ultra Vires, 2d Am. Ed., 721. 'Though a corporation cannot be sued, any more than any other citizen, directly upon a contract or analogous transaciton which does not bind it, yet, if it sets up this defense, it must restore from the other party what it has obtained from him. It may repudiate the transaction if it chooses, but, if so, it must repudiate altogether, it cannot reprobate and approbate; it cannot keep what in another form it has rejected. *Ib.*, 717. See Casey *vs.* La Société, &c., 2 Woods, 77. While courts are inclined to maintain with rigor the limitation of corporate action whenever it is a question of restraining the corporation in advance from passing beyond the boundaries of their charter, they are equally inclined, on the other hand, to enforce against them contracts, though *ultra vires*, of which they have received the benefit.

"Several of the cases hold that where the contract being *ultra vires* no action can for that reason be maintained on the contract, a party may recover the value of the property delivered, or the consideration paid, the parties not being *in pari delicto*. Why should not a corporation be always liable to refund the money or property of a person which it has obtained improperly and without consideration, or, if unable to return it, to pay for the benefit obtained thereby? To say that a corporation cannot sue or be sued upon an *ultra vires* arrangement is one thing. To say that it may retain the proceeds thereof which has come into its possession without making any compensation whatever to the person from whom it has obtained them, is something very different and savors very much of an inducement to fraud. On the other hand, a person who has obtained corporate property or funds in an *ultra vires* transaction, has obtained what the parties dealing with him had no power, no authority, to alienate. It belongs to the corporation, not to him. Therefore, as in every other case of a person obtaining, however *bona fide*, that which belongs to another, such person must take restoration, in specie or in value, it seems necessarily to follow that restoration must similarly be made when the alienation was *ultra vires*."

In Whitney Arms Company *vs.* Barlow, 63 N. Y., 69, it was held:—

"Whether the contract, as originally made, was *ultra vires*, is not a very important inquiry at this time. It was, the State under whose sovereignty it dwells and by whose act and favor it exists, has no interest in arresting its action for the recovery for the moneys equitably due upon a contract fully executed and a work fully accomplished, whatever may be its right to annul its charter. The shareholders,

whose confidence has been abused and whose funds have been diverted from their proper use, have a direct interest in reclaiming and restoring to proper custody and applying to legitimate uses the funds which have been diverted and improperly used for purposes *de hors* the legitimate business of the corporation. The plea of *ultra vires* should not as a general rule prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong.

"Here, as between two corporations, the debtor and creditor corporation, the contract has been fully performed by the creditor, the plaintiff in this action, and the Seal Lock Company has received its full consideration of its promise to pay. The plaintiff has parted with its property to the latter corporation, and unless a legal liability exists on the part of the latter to pay, the plaintiff can neither reclaim the property or recover compensation, and under this technical plea a great wrong will be perpetrated. A purchaser who acquired by contract, and under an agreement to pay it, for the property of a corporation, cannot defeat the claim of the purchase-price by impeaching the right of the corporation to become the owner of the property. One who has received from a corporation the full consideration of his engagement to pay money either in services or property, cannot avail himself of the objection that the contract, thus fully performed by the corporation, was *ultra vires*, or not within its chartered privileges and powers. It would be contrary to the first principles of equity to allow such a defense to prevail in an action by the corporation.

"It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith, fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract. If an action cannot be brought directly upon the agreement, either equity will grant relief or an action in some other form will prevail. The same rule holds *e converso*. If the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation. (*Ex parte* Chippendale, 4 D. G., M. & G., 19; *In re* National P. B. Build. Soc. (L. R.), 5 Ch. Appeals, 309; *In re* Cork, &c., R. C., 4 *Id.*, 748; Fishmongers Co. *vs.* Robertson, 5 McG., 131.)

"The only justification for such a plea by an individual sued upon a contract with a corporation is, that the obligation is not mutual, as the other party, the corporation, would not be bound by it. The objection to such a defense in an action upon an executed contract is given by Tindal, C. J., in the case last cited, in these words: 'Upon the general ground of reason and justice, no such answer can be set up. The defendants having had the benefit of the performance by the corporation of the several stipulations into which they entered, have received the consideration for their own promises; such promise by them is, therefore, not *nudum pactum;* they never can want to sue the corporation upon

the contract in order to enforce the performance of their stipulations which have been already voluntarily performed, and, therefore, no sound reason can be suggested why they should justify their refusal to perform the stipulations made by them on the ground of inability of the corporation, which suit they can never want to sustain.'"

It was said with convincing force in Thomas *vs.* Railroad Company;—

"Where the very nature of the suit is to recover damages for its non-performance it is not an executed contract. Not only so, but it is a contract forbidden by public policy and beyond the power of defendants to make. Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause of the contract which gave them the right to do it. Though they delayed its performance for several years, it was, nevertheless, their right to act when it was done. Can this performance of a legal duty, a duty both to the stockholders of the company and to the public, give to the plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can is, in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts."

In the present case, however, the suit is not for damages for an unexecuted contract, but to recover the consideration agreed to be paid for a lease of property which ended on the first day of July, 1886. If the contention of the defendant that it had a right then to terminate the lease was well founded, nothing more remained to be done by either party. It is impossible to see that the defendant lost anything by reason of the non-enforcible character, if it had such a character, of the covenant not to manufacture other cars; because after the first day of July, 1886, the plaintiff was at liberty to do what it pleased.

Until that day the Pullman Company had retained possession of all the plaintiff's property. Why was it not obliged to pay what it had agreed to pay for a consideration which was then fully performed? Why ought not that company which agreed to pay a certain sum that it had the legal right to agree to pay, be estopped from setting up against the plaintiff, which may not have had the right to covenant that it would not engage in the business of manufacturing cars, but

which had not engaged in that business, and whose property had been used, the fact that it had made an illegal contract to do something which in fact it had not done? How will public policy be promoted by permitting the defendant, which has received the consideration for the contract, to ignore the compensation it agreed to pay?

The contract, so far as concerned the covenant to pay rent up to the first of July, 1886, had been fully executed by the plaintiff. The learned judge below thought that because it had no right to bind itself not to engage in the business of manufacturing cars it ought not to recover the full rental stipulated for. To this we reply that up to the first day of July, 1886, the defendant had received the full consideration for the agreed-upon rental which it had bound itself to pay quarterly.

If the learned judge, however, was right in his theory, he forgot that on the first day of July, 1886, the defendant had tendered to the plaintiff its property and had announced the lease as ended. It was not entitled, after the termination of the lease, to object to their right because of the non-enforcibility. There should have been no allowance to it of a deduction because of this covenant, when it had never been broken and when the right to insist upon it had terminated by expiry of time.

We urge, however, beyond this, that the rental was agreed to be paid as a consideration for the delivery of certain patents, contracts and cars. The duty to pay rent from quarter to quarter resulted from the fact of such delivery. If the superadded and separate covenant by the plaintiff not to engage in the business of manufacturing cars could not be enforced, it was because of a matter of law which both parties were bound to know. Did the fact that an additional covenant was entered into, which was not legally enforcible, release the defendant from its obligation to pay the rental it had agreed to pay as a consideration for what it got?

In Oregon Company *vs.* Windsor, 20 Wallace, 64, a covenant not to use a steamer in California waters for ten years was held to be too large; but this court enforced it for the term of seven years, which was reasonable.

In Wallace *vs.* Day, 2 M. & W., 279, it was said by Lord Abinger, C. B.:—

"This was an action of covenant on indenture, by which the defendants bound themselves to pay the plaintiff a weekly sum during his life. It appeared from the indenture, which was set out on oyer, that the plaintiff had been a carrier from London and Wisbech, and that the defendants contracted with him to purchase the good-will of his business and to take him into their service at a weekly salary; and the plaintiff covenanted with the defendants to refrain from carrying on the business of a carrier during his life, except as therein mentioned, and to serve them faithfully in that business for his life. The defendants demurred on the ground that this covenant, being in restraint of trade, was illegal, and that, therefore, the whole contract was void. I cannot, however, accede to that conclusion. If a party enters into several covenants, one of which cannot be enforced against him, he is not, therefore, released from performing the others. And in the present case the defendants might have maintained an action against the plaintiff for not rendering them the services he covenanted to perform, there being nothing illegal in that part of the contract."

In conclusion, we urge upon the court that the decision of the court below leaves the plaintiff in a most deplorable condition. Its contracts, which were valuable, are gone. The defendant under the lease is now in possession of all the contracts which were formerly owned by the plaintiff. It has been denied a right to recover the sum agreed to be paid in the lease because of the contract being against public policy. If it cannot recover upon the contract, how can it recover upon a *quantum meruit?* If it has no action at law, how can it obtain any relief in equity?

JOHN G. JOHNSON,
For Plaintiff in Error.

APPENDIX.

AN ACT

To encourage manufacturing operations in this commonwealth.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same*, That at any time hereafter when any five or more persons may desire to form a company under the provisions of this act, for the purpose of carrying on the manufacture of woolen, cotton, flax or silk goods, or of iron, paper, lumber or salt, in this commonwealth, and shall have subscribed as capital stock for that purpose, a sum not less than twenty thousand dollars, in such shares as they may have agreed upon, not less than fifty dollars a share, and actually paid in to such persons as they may have appointed to receive the same, the one-fourth part of the capital stock so subscribed, it shall and may be lawful for them to sign and acknowledge, before some officer competent to take acknowledgment of deeds, a certificate in writing, in which shall be stated the corporate name of said company, and the objects for which it has been formed, the amount of its capital stock subscribed, the amount actually paid in and to whom paid, the number and value of the shares into which said stock has been divided, the residence of the subscribers, and the number of shares subscribed by each, the name of the county in which the chief operations of the company are to be carried on, the term of years for which the association is to continue, and the number and names of the directors who shall manage the affairs of said company until the next annual election; the said certificates shall be recorded in the office for the recording of deeds, in the county in which the business of the company is to be carried on as aforesaid, in a suitable book to be kept for that purpose; and a copy of said certificate, duly certified by the recorder of said county, under his seal of office, shall be filed in the office of the secretary of the commonwealth, and the said secretary upon the receipt of the said certified copy, shall enter thereon and upon the original certificate to be retained by the company, the day and date of the filing of the same, and shall moreover cause a true copy of said certificate to be recorded at length in a suitable book to be kept in his office for that purpose.

SEC. 2. For every such certificate so filed in the office of the secretary of the commonwealth, the parties filing the same, shall pay to the secretary for the use of the commonwealth, one-half of one per centum upon the capital stock of said company, payable in five annual installments, the first whereof shall be paid in one year from the time of filing said certificate.

SEC. 3. When the certificate shall have been recorded and filed as aforesaid, the persons who shall have signed and acknowledged the same, and their successors, shall, for the term agreed upon, not exceeding twenty years from the filing of such certificate in the office of the secretary of the commonwealth as aforesaid, be a body politic and corporate in fact and in law, by the name stated in such certificate, and by that name have succession, and be capable of suing and being sued; and shall by their corporate name be capable in law of purchasing, holding and conveying any real or personal estate whatever, necessary or convenient to enable the said company to carry on the business or operations named in such certificate, not exceeding two thousand acres.

SEC. 4. The stock, property and affairs of said company shall be managed by not less than five nor more than thirteen directors, a majority of whom in all cases shall be citizens of this state, who shall respectively be stockholders therein, and who shall, except as provided in the first section of this act, be elected at a general meeting of the stockholders, to be held at such time and place annually as shall be directed by the by-laws of the company, of which time and place public notice shall be given for at least two successive weeks next preceding said general meeting and election, in at least two newspapers printed in the county where the operations of the company shall be carried on, if so many are printed therein, and if so many are not printed therein, then in papers having circulation in said county, printed in an adjoining county; and the election shall be made by such of the stockholders as shall attend, either in person or by proxy: All elections shall be by ballot, and each stockholder shall be entitled to as many votes as he owns shares of stock in said company, but no person shall in any case be entitled to more than one-third of the whole number of votes to which the holders of all of the shares in the capital stock of such company would be entitled; no stockholder, females excepted, residing within ten miles of the place appointed for such general meeting or election, shall vote by proxy, nor shall any person vote as proxy for more than two absent stockholders; the persons receiving the greatest number of votes at any such election shall be directors, and when any vacancy shall happen among the said directors by death, resignation, removal from the state, or otherwise, it shall be filled for the remainder of the year, in such manner as may be provided by the by-laws.

SEC. 5. In case it shall happen at any time that an election of directors shall not be made on the day designated by the by-laws, the company for that reason shall not be dissolved, but it shall be lawful on any other day within the next succeeding sixty days to hold an election for directors, in such manner as shall be provided by said by-laws,

and all acts of the directors in office at the time of such omission to elect shall be valid and binding upon the company until their successors are elected.

SEC. 6. There shall be a president of the company, who shall be designated from the directors of the company, and shall be elected or chosen in such manner as shall be provided by the by-laws, and there shall also be a treasurer and secretary not of the number of directors, who shall in the first instance be appointed by the directors, to serve until the next annual election, at which election, and annually thereafter, they shall be elected by the stockholders, in such manner as shall be provided by the by-laws, and shall hold their offices respectively during the pleasure of the stockholders, but may be removed for cause, to be assigned in writing by the directors and entered on the minutes of their proceedings, and any vacancy in the office of treasurer or secretary shall be filled by the directors until an election shall be had by the stockholders; the persons appointed to receive the amount paid in on the stock subscribed, as provided in the first section of this act, shall pay over the amount so received to the treasurer, or to such other person as the directors may designate, and the said treasurer before he enters upon the duties, shall execute a bond, with such securities as may be deemed proper by the directors, conditioned for the faithful discharge of his duties, and to account for all moneys, books, papers and effects he may receive as such treasurer, which bond shall be renewed annually: *Provided*, That nothing herein contained shall prevent the offices of treasurer and secretary being filled by the same individual, if the company may so desire it.

SEC. 7. The capital stock of the said company shall be called in and paid in money at such times and in such proportions or installments as the directors may require, of which public notice shall be given for at least two successive weeks next preceding the time or times appointed for that purpose, in the newspapers hereinbefore designated; and if any stockholder shall neglect to pay such proportion or installment, or any part thereof, at the time or times appointed, he, she or they shall be liable to pay in addition to the amount so called for and unpaid, at the rate of one per cent. per month for the delay of such payment; and if the same and the additional penalty, or any part thereof, shall remain unpaid for the period of two months, he, she or they shall, at the discretion of the directors, forfeit to the use of the company all right, title and interest in and to every and all share or shares on account of which such default in payment may have been made, or the directors may at their option cause suit to be brought for the recovery of the amount due, together with the penalty of one per cent. per month as aforesaid; in the event of a forfeiture as aforesaid, the share or shares so forfeited may be disposed of at the discretion of the directors, in such manner as may be prescribed by the by-laws; no stockholder shall be entitled

to vote at any election, or at any general or special meeting of the stockholders, on whose share or shares any installment or arrearages may be due and unpaid for the period of thirty days.

SEC. 8. The directors of such company, a majority of whom shall form a quorum for the transaction of business, shall keep minutes of their votes and proceedings in a suitable book to be kept for that purpose; they shall have power to make such by-laws as they shall deem proper for the management and disposition of the stock and business affairs of the company, subject however to the revision and approval of the stockholders, and not inconsistent with the laws of this commonwealth, and providing for the appointment and prescribing the duties of all officers, agents, factors, artificers, and other persons that may be employed, and for carrying on all kinds of business within the objects and purposes of such company; but it shall not be lawful for any such company to use any part of its capital stock or other funds for any banking purposes whatever, nor in the purchase of any stock in any other corporation, nor shall the company make loans to any stockholder or officer of said company, or to any one, on security of its own stock.

SEC. 9. The stock of such company shall be deemed personal estate, and shall be transferable in a suitable book to be kept by the company for that purpose, in person or by attorney duly authorized, in presence of the president or treasurer; but no share or shares shall be transferable until all arrears or previous calls thereon shall have been fully paid in, or the said shares shall have been declared forfeited for the non-payment of the calls thereon in the manner hereinbefore provided: *Provided*, That no such company shall commence operations until fifty per cent. of the stock subscribed shall be paid: All the stockholders in any company incorporated under the provisions of this act, shall be jointly and severally liable in their individual capacities for all debts and contracts made by such company, to the amount remaining unpaid on the shares of stock by them respectively held, until the whole amount of the capital stock as fixed and limited by the said company as in this act provided, shall have been paid in, and a certificate thereof shall have been made and recorded, as prescribed in the following section.

SEC. 10. The president and directors, with the treasurer and secretary of every company incorporated under the provisions of this act, within thirty days after the payment of the last installment on the first half of the amount of capital stock as fixed and limited by the company, and of each subsequent installment, shall make a certificate, stating the amount of the capital so paid in, which certificate shall be signed by said president, treasurer, secretary, and a majority of the directors, and verified by the oath or affirmation of said president and treasurer; and they shall within the said thirty days, cause the said certificate to be recorded in the office for recording deeds in the county where the chief business of the company shall be carried on as aforesaid.

SEC. 11. Every such company incorporated as aforesaid, shall publish, for two successive weeks in the month of December, annually, in the newspapers before mentioned, a notice or statement showing the amount of its capital stock subscribed, the amount thereof actually paid in, and the amount of its debts, as they severally existed on the last day of November, immediately preceding, which notice or statement shall be signed by the president, treasurer and secretary, under oath or affirmation.

SEC. 12. In case of the dissolution, failure or insolvency of any company, incorporated under the provisions of this act, all debts due or owing to operatives or laborers for services performed for such company for any period, shall first be provided for, and paid out of the effects or assets of said company.

SEC. 13. At each and every annual meeting of the stockholders of any company to be held as hereinbefore provided, the president and directors for the year preceding, shall lay before them a full and complete statement of the affairs of the company for the twelve months immediately preceding, exhibiting under the various appropriate heads, the amount of money received, and from what sources, the amount disbursed, and for what purposes, the amount of the debts of the company, and the balance remaining with the company.

SEC. 14. Dividends of so much of the profits of any such company, as shall appear advisable to the directors, shall be declared in the months of June and December annually, and paid to the stockholders, or their legal representatives, at any time after the expiration of ten days from the time of declaring the same; but the said dividends shall in no case exceed the amount of the net profits actually acquired by the company, so that the capital stock shall never be impaired thereby, and if any dividend shall be declared and paid, which shall impair the capital stock of said company, the directors consenting thereto, shall be jointly and severally liable in their individual capacities, for all the debts of the company then existing, and all that shall thereafter be contracted, so long as they respectively continue in office: *Provided*, That if any director shall be absent at the time of declaring such dividend, or shall object thereto, and shall within the ten days above named, file a certificate of his absence or objection, in writing, with the treasurer of the company, and cause a copy thereof to be recorded in the office for recording of deeds, in the county in which the operations of the company are carried on as aforesaid, he shall be exempt from said liability, except as stockholder.

SEC. 15. That within thirty days after the declaration of any dividend, by any company incorporated under the provisions of this act, the amount of state tax to which the stock of such company may be liable,

shall be paid into the state treasury, and a statement under oath or affirmation of the president or treasurer of such dividend, shall be communicated to the auditor-general.

SEC. 16. The copy of any certificate of incorporation recorded and filed in pursuance of this act, duly certified by the recorder of the proper county, to be a true copy of such certificate, shall be received in all courts and places as evidence of the incorporation of such company, if the said certificate shall conform to the provisions of this act.

SEC. 17. Persons holding stock in any such company as executors, administrators, guardians or trustees, shall not be personally subject to any liability as stockholders of such company, and the estates and funds in the hands of such executors, administrators, guardians and trustees, shall be liable in their hands in like manner, and to the same extent as the testator or intestate, or the ward or person interested in such trust fund would have been, if they had respectively been living and competent to act, and held the same stock in their own names: *Provided*, That nothing herein contained shall be construed as authorizing investment by trustees, executors or guardians in such stock.

SEC. 18. Every such executor, administrator, guardian or trustee, may represent the shares of stock in his hands, at all meetings and elections of the company, and may vote accordingly as a stockholder.

SEC. 19. Whenever any company embraced in the provisions of this act, shall desire to call a meeting of the stockholders for the purpose of increasing or diminishing the amount of the capital stock, or for extending its business, it shall be the duty of the directors to publish a notice signed by at least a majority of them, in the newspapers hereinbefore mentioned, at least three successive weeks, and to deposit a written or printed copy thereof in the post office, addressed to each stockholder at his usual place of residence, at least two weeks previous to the day designated for holding such meeting, which notice shall specify the object of meeting, the time and place when and where such meeting shall be held, the amount to which it is desired to increase or diminish the capital, and the business to which it is proposed to extend the operations of the company.

SEC. 20. If at the time and place specified in the notice provided for in the preceding section, stockholders shall appear in person or by proxy, representing not less than two-thirds of all the shares of the stock of the corporation, they shall organize by choosing one of the directors, if present, and if not, then one of the stockholders, as chairman of the meeting, and some suitable person as secretary, and the chairman shall appoint two of the stockholders present to act as tellers, when they shall proceed to a vote of those present in person or by

proxy, as provided in the fourth section of this act; and if on canvassing the votes given it shall appear that the holders of two-thirds of all the shares composing said capital have voted in favor of increasing or diminishing the amount of the capital stock, or of extending its business, as the case may be, then and not otherwise, a certificate of the proceedings shall be made out, showing a compliance with the provisions of this act, the amount of capital actually paid in, the business to which it is extended, the whole amount of the debts and liabilities of the company, and the amount to which the capital shall be increased or diminished, which certificate shall be signed by the said chairman, secretary and tellers, and verified by their respective oaths or affirmations; the said certificate when so signed and verified, shall be recorded, and a certified copy thereof filed in the office of the secretary of the commonwealth, as provided in the first section of this act, and when so recorded and filed, the capital stock of such corporation shall be increased or diminished to the amount specified in such certificate, and the business extended according to the vote of the stockholders as aforesaid.

SEC. 21. Every such company so increasing or diminishing its capital stock as aforesaid, shall have power to receive and hold such real estate as may be necessary or convenient for the objects and purposes of the corporation, and no more.

SEC. 22. The total amount of the debts and liabilities of any such company shall never exceed three times the amount of its capital actually paid in; and if any debts or liabilities shall be contracted exceeding said amount, the directors and officers contracting the same or assenting thereto, shall be jointly and severally liable in their individual capacities for the whole amount of such excess.

SEC. 23. In any action brought to enforce any liability under the provisions of this act, the plaintiff may include as defendants any one or more of the stockholders of such company claimed to be liable therefor, and if judgment be given in favor of the plaintiff for his claim, or any part thereof, and any one or more of the stockholders so made defendants shall be found to be liable, judgment shall be given against him or them; the execution upon such judgment shall be first levied on the property of such company, if to be found in the county where the chief business of the company is carried on, and in case such property sufficient to satisfy the same cannot be found in said county, the deficiency, or so much thereof as the stockholder or stockholders, defendants in such judgment, shall be liable to pay, shall be collected of the property of such stockholder or stockholders; on the payment of any judgment as aforesaid, or any part thereof, by one or more stockholders, the stockholder or stockholders so paying the same shall be entitled to have such judgment, or so much thereof as may have been paid by him or them, assigned by him or them for his or their benefit, with power to enforce

the same in manner aforesaid, first against the company; and in case the amount so paid by him or them shall not be collected of the property of the company, t[illegible] ratably against the other stockholders, if any such there be, originally liable for the claim on which such judgment was obtained; but no stockholder shall be personally liable for the payment of any debt contracted by any such company, unless suit for the collection of the same shall be brought against such company within six years after such debt shall have become due.

SEC. 24. It shall be the duty of the directors of every such company, to cause a book to be kept by the treasurer or secretary thereof, at the office or principal place of business of the company, which shall contain the names of all persons, alphabetically arranged, who are or who shall within one year have been stockholders of such company, showing their places of residence, the number of shares of the stock held by them respectively, and the time when they respectively became the owners thereof, and the amount paid on such shares, and the total amount of the capital stock paid in; which book shall at the end of the year be carefully preserved in the office of the company for future reference, and shall during the usual business hours of the day, on every business day, be open for the inspection of all persons who may desire to inspect the same, and any and every person shall have the right to make extracts from such books; and no transfer of stock shall be valid for any purpose whatever, except to render the person to whom it is transferred, liable for the debts of the company, according to the provisions of this act, until it shall have been entered therein as required by this section, by an entry showing by and to whom the same has been transferred; such book shall be *prima facie* evidence of the facts therein stated, in favor of the plaintiff, in any suit or proceeding against such company, or against any one or more stockholders; and if any such company shall neglect or refuse to keep such book, or to make or cause to be made any proper entry therein, or shall, on application made to any director or officer thereof, neglect or refuse to exhibit the same, or to allow extracts to be taken therefrom, as hereinbefore required, such company shall forfeit and pay to the party aggrieved, fifty dollars for each and every day it shall so neglect or refuse as aforesaid, recoverable by said party as in other cases of claims against such company.

SEC. 25. Special meetings of the stockholders in any such company, shall be held at the request of the president, or at the request of any number of stockholders representing not less than one-fourth of the whole number of shares in the capital stock of such company, giving at least two weeks' public notice in the newspapers hereinbefore mentioned, of the time and place designated for holding the same, and stating specifically the object of such meeting, and the objects stated in such notice and no other, shall be acted upon at such meeting; nor

shall any business be transacted at any such special meeting, unless a majority of all the shares in the stock of such company shall be there represented, but the meeting may adjourn from time to time, or until such majority shall be present.

SEC. 26. The legislature reserves the right to amend, alter or repeal this act, in such manner, however, as shall do no injustice to the corporators; but such amendments, alterations or repeal, shall not take away or impair any remedy given against any company, created in pursuance of the provisions of this act, its stockholders or officers, for any liabilities which shall have been previously incurred.

WILLIAM F. PACKER,
Speaker of the House of Representatives.
GEORGE DARSIE,
Speaker of the Senate.

APPROVED—The seventh day of April, one thousand eight hundred and forty-nine.

WM. F. JOHNSTON.

Office Supreme Court U. S.
FILED.
JAN 8 1890
JAMES H. McKENNEY
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

PULLMAN'S PALACE CAR COMPANY,
Plaintiff in Error,
vs.
THE CENTRAL TRANSPORTATION COMPANY,
Defendant in Error.
No. 190.

THE CENTRAL TRANSPORTATION COMPANY,
Plaintiff in Error,
vs.
PULLMAN'S PALACE CAR COMPANY,
Defendant in Error.
No. 692.

APPENDIX TO BRIEF FOR PULLMAN'S PALACE CAR COMPANY.

BARNARD & GUNTHORP, LAW PRINTERS, CHICAGO.

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BARNARD & GUNTHORP, LAW PRINTERS, CHICAGO.

Charter of the Central Transportation Company.

This is to certify that the undersigned have formed a company under the provisions of the act of assembly of the Commonwealth of Pennsylvania, entitled, An Act to encourage manufacturing operations in this commonwealth, approved the 7th day of April, 1849, and the supplements thereto. The company has been formed for the purpose of the transportation of passengers in railroad cars constructed and to be owned by the said company in accordance with the several letters patent granted to T. T. Woodruff, to wit: Letters Patent No. 16,159 and No. 16,160, dated December 2nd, A. D. 1856; No. 24,259, dated May 31st, A. D. 1859 and No. 26,942, dated January 24th, A. D. 1860.

The corporate name of the company will be The Central Transportation Company. The capital stock of the company will be two hundred thousand ($200,000) dollars, to be divided into four thousand shares of fifty dollars each. The sum of one hundred thousand ($100,000) dollars has actually been paid in to T. T. Woodruff, one of the undersigned, who was appointed to receive the same in amounts pro rata with the several subscriptions.

The residences of the subscribers and the number of shares subscribed for, and the amount paid in to the said T. T. Woodruff by each are as follows:

Names of Subscribers.	Residence.	No. of Shares Subscribed.	Amounts. Paid.
T. T. Woodruff,	Philadelphia,	2,141	$53,525
O. W. Childs,	Philadelphia,	536	13,400
G. R. Dykeman,	Philadelphia,	536	13,400
Jonah Woodruff,	Pittsburgh,	322	8,050
W. S. Hickox,	Mansfield, Ohio,	465	11,625

The chief operations of the company are to be carried on in the city and county of Philadelphia, and the association is to continue for the term of twenty years from the time when the same may be incorporated.

Directors, to wit: T. T. Woodruff, O. W. Childs, G. R. Dykeman, Jonah Woodruff, W. S. Hickox, have been chosen to manage the affairs of the company until the next aunual election.

T. T. Woodruff,
O. W. Childs,
G. R. Dykeman,
Jonah Woodruff,
W. S. Hickox.

Witness as to W. S. Hickox's signature:
James E. Cox.
John Meredith.

As to Jonah Woodruff:
T. Donaldson,
T. Ludwig Koetlsen,
James McCahen,
John Newsham.

THE STATE OF OHIO, } ss.
RICHLAND COUNTY. }

Personally appeared before the undersigned, judge of the Probate court within and for said county and state, and the said court being a court of record, W. S. Hickox and acknowledged the foregoing signing and sealing of this instrument to be his voluntary act and deed for the uses and purposes therein expressed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Mansfield, this 4th day of December, A. D. 1862.

JOHN MEREDITH,
Probate Judge.

CITY OF PITTSBURGH, }
COUNTY OF ALLEGHENY, }
STATE OF PENNSYLVANIA. }

Before me, James Donaldson, an alderman and *ex officio* justice of the peace in and for said county, personally came Jonah Woodruff and acknowledged the signing and sealing of the foregoing instrument as his act and deed for the purposes therein set forth, and desired that the same might be recorded as such.

Witness my hand and seal this sixth day of December, A. D. 1862.

J. DONALDSON. [SEAL.]
Ald. & Ex officio.

STATE OF PENNSYLVANIA, } ss.
CITY OF PHILADELPHIA. }

Before me, the subscriber, an alderman of the city and county of Philadelphia, on this 8th day of December, 1862, personally came T. T. Woodruff, O. W.

Childs and G. R. Dykeman and acknowledged the foregoing instrument of writing to be their act and deed, and desired the same might be recorded as such.

Witness my hand and seal the day and year aforesaid.

JAMES MCCAHEN. [SEAL.]
Ald.

I certify that I have examined the foregoing certificate and that the same, in my opinion, is properly drawn and signed and is in conformity with the provisions of the constitution and laws of this commonwealth.

Attorney General's Office, Harrisburg, December 11, 1862.

W. M. MEREDITH,
Attorney General.

Recorded Dec. 26th, 1862.

CITY AND COUNTY OF PHILADELPHIA, } ss.
STATE OF PENNSYLVANIA. }

I, George G. Pierie, recorder of deeds in and for said city and county, do hereby certify that the above and foregoing is a true and correct copy of an instrument of writing found of record in my office in Miscellaneous Book A. D. B. No. 1, page 513, etc.

Witness my hand and seal of office this 7th day of April, A. D. 1887.

[SEAL.]

JOS. K. FLESCHER,
Deputy Recorder of Deeds.

AN ACT to extend the Charter of the Central Transportation Company, to empower them to lease their property and increase their capital stock.

SECTION 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, that the charter of the Central Transportation Company, incorporated under the act of Assembly entitled "An Act to encourage manufacturing operations in this Commonwealth," approved April seventh, one thousand eight hundred and forty-nine, and the supplements thereto, be and the same is hereby extended for ninety-nine years from the expiration of its present charter; and said company are hereby empowered to enter into contracts with corporations of this or any other State for the leasing or hiring and transfer to them, or any of them, of their railway cars and other personal property; and shall have power to increase their present capital stock two hundred thousand dollars.

BUTLER B. STRANG,
Speaker of the House of Representatives.
CHARLES H. STINSON,
Speaker of the Senate.

APPROVED the ninth day of February, Anno Domini one thousand eight hundred and seventy.

JOHN W. GEARY.

An Act to Incorporate Pullman's Palace Car Company.

Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly,* That George M. Pullman, John Crerar and Norman Williams, Jr., and their associates, successors and assigns, be and are hereby created a body politic and corporate, under the name and style of Pullman's Palace Car Company, with all powers, rights, privileges and immunities incident to corporations, and necessary or useful for the purposes of this act. *Provided,* that if the corporation created by this act shall not organize within one year after the passage hereof, then this act shall be null and void.

Section 2. The capital stock of the said company shall be one hundred thousand dollars, and be divided into shares of one hundred dollars each, and it may be increased from time to time, as a majority of the stockholders may direct, and shall be issued and transferred in such manner and under such conditions as the directors of the said company shall by the by-laws thereof prescribe.

Section 3. The corporate powers of the said company shall be vested in and exercised by a board of directors, consisting of such number of persons, not less than three nor more than seven, as the stockholders of the said company may from time to time direct.

The said directors shall be chosen by the stockholders at such time and place as may be fixed by the by-laws of the said company, and shall hold their offices for one year and until their successors are elected and

qualified. They shall elect one of their number president of said company, and may fill any vacancy in the said board occasioned by death, resignation, or otherwise, for the unexpired portion of the term of office so becoming vacant, and may make such rules, by-laws and regulations, and appoint such officers and servants as they may from time to time deem expedient. Until an election of directors, as herein provided, the persons named as corporators in the first section of this act shall constitute a board of directors, and shall have and may exercise all the powers of such board.

SECTION 4. The said corporation shall have power to manufacture, construct and purchase railway cars, with all convenient appendages and supplies for persons traveling therein, and the same may sell or use, or permit to be used, in such manner and upon such terms as the said company may think fit and proper.

SECTION 5. The said corporation shall have power to borrow money, and may secure the payment of the same by deed of trust, mortgage, or other security.

SECTION 6. It may be lawful for the company hereby incorporated to purchase, acquire and hold such real estate as may be deemed necessary for the successful prosecution of their business, and may have power to sell and convey the same.

SECTION 7. This act shall be deemed a public act, and shall take effect from and after its passage.

F. CORWIN,
Speaker of the House of Representatives.
WM. BROSS,
President of the Senate.

Approved February 22nd, 1867.
R. J. OGLESBY.

UNITED STATES OF AMERICA, } ss.
STATE OF ILLINOIS. }

I Henry D. Dement, secretary of state of the State of Illinois, do hereby certify that the above and foregoing is a true copy of an act of the State of Illinois, approved and in force on the 22d day of February, A. D. 1867, as the same now remains on file in my office.

In witness whereof, I hereto set my hand and affix the great seal of state, at the city of [SEAL.] Springfield, this 15th day of April, A. D. 1887.

HENRY D. DEMENT,
Secretary of State.

Office Supreme Court U. S.
FILED,
JAN 11 1890
JAMES H. McKENNEY
CLERK.

No. 190. *October Term, 1889.*

Supreme Court of the United States.

Pullman's Palace Car Company,
Plaintiff in Error,

vs.

The Central Transportation Company,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OF DEFENDANT IN ERROR.

JOHN G. JOHNSON,
For Defendant in Error.

Allen, Lane & Scott, Printers, 229-231-233 South Fifth Street, Philadelphia.

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STATEMENT OF THE CASE BY THE DEFENDANT IN ERROR.

On the seventeenth day of February, 1870, the plaintiff leased to the defendants, by an indenture, of which a copy is printed on page 7, all its cars and patents, together with a number of contracts then existing between it and various railroad companies, which provided for the use of its cars on other roads. The duration of the term was to be ninety-nine years. There were provisions for keeping up and renewing the cars and equipments. A rental of $264,000 was to be paid in equal quarterly installments. By the eighth clause of the lease it was provided:—

> "In the event that any of the railroad companies mentioned in the assigned contracts shall, at any time during this agreement, refuse to permit the cars of the second party to be run on and over their respective lines of road, so that, by reason of such prevention or refusal, the profits, income—revenue derived from and under any other remaining contracts with other and remaining railroad companies mentioned in the assigned contracts, shall fall below the sum of $264,000, then and in that event said party shall have the right either to declare this contract null and void, and surrender to said first party the said hereinbefore demised property, or shall and will pay in like manner, in lieu of said sum of $264,000, such sum or share of the net revenue from the remaining lines of the roads as the parties hereto may have at the time agreed upon."

The lessee entered upon the possession of the demised property and continued in possession without any dispute arising, paying the stipulated rental of $264,000 per annum until the year 1884.

Inasmuch as one of the assigned contracts between the lessor and the Pennsylvania Railroad Company was soon about to expire, to wit, on the twenty-seventh day of January, 1885; and inasmuch as it was claimed by the lessee that it would not be able to renew said contract upon terms as satisfactory as were those of the original agreement, negotiations were entered into between the lessor and the lessee, looking to a modification of the lease in the way of an abatement in the rental

after the contract with the Pennsylvania Railroad Company should expire.

At the annual meeting of the stockholders of the corporation plaintiff, at which was elected the board of directors which subsequently carried on the negotiations, and which was held on the twenty-first day of April, 1884, it was resolved:—

"That the board of directors be and they are hereby authorized to make a modification of the existing lease with the Pullman's Palace Car Company, if in their judgment modifications or changes may be deemed necessary, and to submit their action in that behalf to the stockholders for their approval."

Negotiations, looking to new terms by way of modification, were conducted for many months afterwards between Mr. Pullman, acting for the lessee, and the board of directors of the plaintiff. The members of this board were the owners of an exceedingly small number of shares of stock in the corporation, and they accepted, apparently without question and without proof, the assertion made on behalf of the lessee that, under the best agreement which could be made with the Pennsylvania Railroad Company, the receipts by the lessee would fall below $264,000 per annum. In proceedings now pending between the lessor and the lessee an issue as to this fact has been raised, upon which much testimony has been taken.

During the course of these negotiations Mr. Pullman was made aware of the fact that the stockholders' resolution above quoted had been passed. On the part of the lessor, it was testified that during the negotiations its directors had always asserted their intention to be bound by this resolution. It was not asserted by any witness for the lessee that the directors at any time had expressed any intention to act finally in disregard of it.

The lessor's board of directors arrived at the conclusion that it would be advisable to make a modified contract providing for the payment of but $66,000 per annum, and for many other material reductions and changes. It is believed by the lessor that they reached this conclusion through a failure to properly inform themselves of the facts. There was no proof of the truth of this conjecture, however, at the trial, be-

cause no question could there arise as to whether or not the judgment of the board was sound.

On the twenty-sixth day of February, 1885, the board of directors passed a resolution, which appears on page 125. It recited, *inter alia* :—

"WHEREAS, At an annual meeting of the stockholders of this company, held April 21st, 1884, it was '*Resolved*, That the board of directors be and they are hereby authorized to make a modification of the existing lease with the Pullman's Palace Car Company, if in their judgment modifications and changes may be deemed necessary, and to submit their action in that behalf to the stockholders for their approval,' therefore,

"*Resolved*, That the president and secretary be and they are hereby authorized to execute, on behalf of their company, the agreement of modification in accordance with the foregoing resolution, in the form prepared by counsel and now submitted to this board; also,

"*Resolved*, That a meeting of the stockholders be called to be held on the 18th of March, 1885, at 11 o'clock A. M., to whom shall be submitted the action of this board for their approval; and,

"*Resolved*, That the president and secretary are hereby instructed to advertise the call for said meeting, according to law.

"The question upon above preambles and resolutions was put and they so ordered, but as to the form of agreement not being quite perfected, the board adjourned to meet at same place, on Friday, 27th inst., at 3 o'clock P. M."

On the 27th February, 1885, the board met again. The minutes show the following :—

"The agreement between the Pullman's Palace Company and the Central Transportation Company for a modification of the rental, as drawn up by counsel, and ordered by the board of directors, at meeting of 26th, was read, as follows :— * * *

"A vote was then taken on approval or disapproval of foregoing agreement. The result was :—

"Yeas—Howard, Wright, Lane, Kisterbock, Bingham.

"Nays—McClary, Jr., Lockard.

"After which Mr. Lockard asked Mr. McClary to make the vote unanimous, which was done, and the agreement was unanimously approved of."

After the adjournment of the board there was an interview between some, or possibly all, of its members, and Mr. Pullman, General Porter, and the counsel of the lessee. There was a difference of testimony as to what occurred at this interview.

On the 28th of February, 1885, the officers of the lessor again met the same parties at the Continental Hotel. The agreement was then present. It was executed with the seal of the lessor by its officers, and was delivered by them to Mr. Pullman, who took with him both copies. There was no execution of either copy on behalf of the lessee, which retained them until the tenth day of March, 1885, until after a notice of a meeting to approve had been sent out by the lessor to its stockholders, and until after much discussion as to the judiciousness of what had been done by the directors had arisen. On that day, one of these copies, duly executed, was forwarded to the lessor's secretary. Plaintiff and defendant each called witnesses as to what had occurred at the Continental Hotel at the time the modified lease was executed by the lessor. They differed widely and hopelessly in their testimony. The witnesses for the lessee, however, admitted that Mr. Lane, one of the directors and the counsel of the plaintiff, there desired to insert in the agreement itself a clause, providing that it should be submitted to the stockholders for their approval, and that Mr. Pullman would not consent that it should be thus inserted. The widest divergence of testimony was as to what reason had been assigned by Mr. Pullman for not wanting an actual insertion in the lease itself, of the condition. His witnesses swore in effect that he said he would take the chances of the power of the board of directors to act without the approval of the stockholders. The witnesses for the lessee swore that he said he would take the chances of securing the approval of the stockholders.

A notice to the lessor's stockholders to meet on the eighteenth day of March, 1885, to approve, or disapprove, of the modified agreement was immediately sent out. Mr. Pullman, prior to the 10th of March, as General Porter admitted, was aware of the fact that this meeting had been called and that this notice had been sent. His counsel and representative was present at the meeting, which convened on the eighteenth day of March, 1885. Great opposition to the modified agreement was there manifested, and the meeting adjourned until the day of the annual stockholders' meeting in April, 1885. At this

adjourned annual meeting the modified agreement was rejected by an almost unanimous vote of those who were present. At the same time a new board of directors was elected. The lessee was promptly notified of the refusal by the stockholders to ratify the modification.

During March, 1885, a correspondence took place between the lessor and the lessee, which showed that the old board of directors of the lessor, asserted to Mr. Pullman their claim that what they had agreed upon was not to be conclusive until it was approved by the stockholders; and that this assertion was not denied by the lessee nor by Mr. Pullman, though the latter, on the 30th March, 1885, wrote a letter, in which he referred to the adjourned meeting to be reconvened in April to consider the matter of approval.

It was claimed at the trial, on behalf of the lessee, that upon the faith of this modified agreement it had immediately thereafter entered into a contract with the Pennsylvania Railroad Company. Whilst it is probably true that almost immediately after this agreement had been signed, the leading particulars of the new agreement between the Pullman's Palace Car Company and the Pennsylvania Railroad Company were substantially settled, it is certain that no binding agreement were executed between these companies until July, 1885. Until that time, some of the minor terms were left open for adjustment.

After the new board of the lessor had been elected it held several meetings with Mr. Pullman, who was accompanied by General Porter and by his counsel, with a view to settling the dispute which had arisen by reason of Mr. Pullman's claim that the modified agreement was binding upon the lessor, and of the latter's claim that the lessee, until the modification was agreed upon, was bound to pay the old rental. At one or more of these meetings the validity of this modified agreement was the subject of discussion. The witnesses who were called at the trial, as to what was said at these meetings, differed very widely. Mr. Stevens, the president of lessor's new board (page 19), swore:—

"We had been talking some minutes about other matters, and then the question came up in regard to the modified lease, and I asked the

question of Mr. Pullman, 'Did you not know that that lease was of no avail unless it was confirmed by the stockholders, as per their resolution?' He said, 'Yes; but I take my chances on that.' That was the answer to that particular question.

"THE COURT:—Repeat your question.

"A. I asked him if he was not aware that the modified lease that he spoke of had to be submitted to the stockholders for their approval before it was binding, and he said, yes, but he took his chances on that."

The lessor brought suit on said lease against the lessee to recover the rental due for about six months ending on the first day of July, 1885, at the rate of $264,000 per annum.

The defendant filed general issue pleas, and also filed a special plea—which is not printed in the record—by which it set up in bar that the lease sued upon had been modified by an agreement which had been executed on the twenty-seventh day of February, 1885.

No question as to the legality of the old lease was raised, nor as to the power of lessor or of lessee to make it. The sole question was an issue of fact, whether or not the modified agreement had been finally and conclusively delivered as a binding one upon the lessor.

ARGUMENT.

In discussing the questions raised by this record we are somewhat embarrassed by the fact that no assignments of error have yet been filed by the plaintiff in error, and we are therefore compelled to hunt through the record for the exceptions which were taken, and to discuss them as best we can, without knowing whether all of them will be relied upon by it, and also without being able to refer to them, except in an inconvenient way. We will consider:—

(*a.*) Exceptions to admission of evidence.

(*b.*) Exceptions to the charge of the court.

(*a.*) Exceptions to admission of evidence.

The first exception (page 19) is to the overruling by the court of the objection which was taken to the offer to prove by Mr. Stevens:—

"That subsequently to April, 1885, as president of the Central Transportation Company, he had several interviews with Mr. Pullman, the president of the Pullman Palace Car Company, for the purpose of arranging a settlement of the difficulties between the two companies, and that in the course of the conversation concerning the modified lease, Mr. Pullman, president of the company, admitted that the same had been delivered to him with the knowledge on his part that it required the approval of the stockholders of the Central Transportation Company to make it binding, and that it was delivered with the understanding that it would not bind the company until such approval had been obtained, he remarking that he would take the chances of obtaining such approval."

It was not sought to prove the declarations of an officer concerning a previously-occurring fact, made at a subsequent time, when he was not acting on behalf of the company. Such declarations were held by this court in Packet Co. *vs.* Clough, 20 Wall., 528, to be inadmissible, in an opinion of which the syllabus reads thus:—

"The conversation of a captain of a steamer with a party injured in getting on his boat, made two days and a half after the accident occurred, in which he attributed the accident to the carelessness of the servants of the boat in putting out the plank, is not evidence to charge the owners of the boat with fault, and this though made while the boat was still on its voyage, and before the voyage upon which the injured party had entered was completed."

What was offered was to show that whilst the president of the corporation lessee was acting on behalf of such corporation in the course of a formal interview with the board of directors of the corporation lessor, held for the purpose of settling disputes between them, he had stated certain things concerning the agreement, the validity of which was then the subject of discussion.

In Xenia Bank *vs.* Stewart, 114 U. S., 227, it was held:—

"The ruling of the court in allowing these questions and answers to be read to the jury, notwithstanding the objection of the plaintiff in error, is now assigned for error. Its contention is, that it furnished the money to pay McMillan's note for $2600, held by Hyde, for which the certificate for twenty shares was pledged, and that it thereby, on the delivery of the certificate to it by Hyde, became entitled to the possession thereof as security for the note. The defendants in error insist that the money to take up the note held by Hyde was paid by their intestate, McMillan.

"The plaintiff in error complains that upon this issue the statements of McClure, its cashier, made several days after the alleged payment of the note by McMillan, were admitted to show such payment, and insists that this was error on the ground that the declarations of an agent concerning a past transaction cannot be given in evidence to bind his principal.

"The rule upon this subject has been thus laid down by this court:—

"Whatever an agent does or says in reference to the business in which he is at the time employed and within the scope of his authority, is done or said by the principal, and may be proved as if the evidence applied personally to the principal." American Fur. Co. *vs.* United States, 2 Pet., 358. It is because the declaration of an agent is a verbal act and part of the *res gestæ* that it is admissible, and whenever what he did is admitted in evidence, then it is competent to prove what he said about the act while he was doing it. Mechanics' Bank of Alexandria *vs.* Bank of Columbia, 5 Wheat., 326, 336; Cliquot's Champagne, 3 Wall., 114; Cooley *vs.* Norton, 4 Cush., 93; Hannay *vs.* Stewart, 6 Watts, 487; Goth *vs.* Howard, 8 Bing., 451.

"Applying these principles, we think the testimony objected to was properly admitted. The declarations of McClure were made, so the record states, at the time he paid Hyde the amount of the note. They were, therefore, clearly a part of the transaction. For Hyde, being the holder of the certificate of stock as collateral security for the note, was entitled to know by whom the payment of the note was made, so as to decide whether to return the certificate to McMillan or to turn it over to the bank, or, if it was left with the bank, in what capacity the bank took it, whether for its own security, or as agent for McMillan. The declarations of McClure were made to Hyde in explanation of the payment of the money to him, and were therefore admissible as part of the act of payment.

"The declarations of McClure in reference to the purchase by Hyde of the twenty shares of stock were made at the same time, and as they were offered as tending to show by whom the money to pay the McMillan note was furnished, they were also a part of the transaction, and on that ground, admissible.

"The plaintiff in error contends that a conversation which took place two months after the payment of the note, between McClure and Hyde, in reference to the purchase by the latter of the twenty shares of stock, was wrongly received in evidence.

"But it plainly appears from the record that this second conversation was part of a treaty between McClure and Hyde, commenced on the Wednesday after McMillan's death, when the McMillan note was paid for the purchase of the twenty shares of stock by Hyde. It was offered to show by the declarations of its cashier that the bank did not, when the declarations were made, claim any general or special property in the stock, but, in effect, admitted it to be the property of the estate of McMillan.

"The declarations made by an officer or agent of a corporation, in response to timely inquiries, properly addressed to him and relating to matters under his charge, in respect to which he is authorized in the usual course of business to give information, may be given in evidence against the corporation. Bank of Monroe *vs.* Field, 2 Hill, 445; McGenness *vs.* Adriatic Mills, 116 Mass., 177; Moss *vs.* Connecticut River Railroad Co., 6 Gray, 450; Abbot, Trial Evidence, 44.

"As cashier, McClure had charge of all the money, securities, and valuable papers of the bank. Wild *vs.* Bank of Passamaquoddy, 3 Mason, 505; Franklin Bank *vs.* Steward, 37 Maine, 519. It was his duty to surrender securities pledged for the loans of the bank upon payment of the loans. Fleckner *vs.* United States Bank, 8 Wheat., 338, 360. And, although he might not be authorized to dispose of the securities of the bank without the orders of the directors, yet it was within the scope of his general authority as cashier to receive offers for their purchase, and to state whether or not the bank owned securities which a customer wanted to buy. This naturally fell within his duty as the executive officer of the bank and the custodian of its assets. His statement to a person who was in treaty to purchase, that the bank was not the owner of a certain security in his manual possession as cashier, was clearly within the line of his duty, and was, therefore, binding on the bank. We think there was no error in admitting in evidence the declarations of McClure."

The second exception appears on page 33.

Without objection, the minutes of the meeting of the board of Directors of the lessor, held in 1870, had been put in evidence. It appeared by these minutes that a great majority of stockholders had given their written approval to the original lease of February, 1870, which lease had been acquiesced in for about sixteen years, and which was an instrument, as lessee contended, which it was within the power of the directors, without consultation with the stockholders, to make.

After these minutes had been put in evidence and read, there was an objection in these words:—

"Objected to, on the ground that an action of the stockholders was not taken at a corporate meeting."

We doubt whether this exception will be pressed by way of assignment of error thereon. It was immaterial how the action of the stockholders had been taken. There was and could have been no objection to the minutes themselves.

The third exception appears on page 33.

The minutes of an annual meeting of the lessor's stockholders, held on the twenty-first day of April, 1884, were read, for the purpose of "showing that they passed a resolution of which the defendants were apprised prior to the making of the alleged modified lease, to the effect that the board of directors should negotiate a modification of the lease, which should be submitted to the stockholders for their approval."

The offer of these minutes was relevant, whether the stockholders did or did not have authority to bind the directors by their resolution. The resolution was referred to in the negotiations, as all of the witnesses testified, between Mr. Pullman and the directors of the corporation plaintiff. It was embodied in the minutes of the directors of the 26th and 27th of February, 1885. It was impossible to understand what was said by this resolution without reading it. The witnesses for the plaintiff swore that it was always asserted by the lessor's directors that what they would do must necessarily be approved by the stockholders, in consequence of said resolution.

The fourth exception appears on page 47.

There was an exception taken to the refusal of the court to strike out the original lease because of its "appearing that it was not ratified nor authorized by any formal meeting of the stockholders of the company."

It did not appear that any formal meeting of the stockholders was necessary to ratify the original lease. They had been consulted, however, and stockholders holding thirty-six forty-fourths of the total issue of shares had consented to the lease.

Not only had this lease been acquiesced in for sixteen years, and not only had there been from 1870 until the first day of July, 1886, a possession thereunder by lessee of all the lessor's property; but in April, 1885, at the annual meeting then held, the stockholders of the lessor, by an almost unanimous vote, had refused to modify the old lease.

The fifth and sixth exceptions are to be found on pages 49 and 80.

An offer was made by the defendant to prove that certain of the contracts which had been assigned by the lessor to the

lessee had not been renewed, for the purpose of showing "that the plaintiff should be satisfied with the verdict here for such a sum as is equal to the net profits of the road."

The issue raised by the pleadings was that a written modification had been finally agreed upon between lessor and lessee, on the 27th of February, which was subsisting at the time suit was brought. For the purpose claimed, the testimony offered was not relevant. It was not revelant for any purpose. If the agreement of 27th February, 1885, had been finally delivered, it was immaterial whether the revenues had or had not fallen off. If it had not been delivered, there was a lack of any proof that there had been any election or agreement that lessee should pay lessor, instead of $264,000 per annum, or $66,000 per annum, "net profits."

The offer on page 49 was followed by another, which appears on page 50.

"Mr. Bullitt:—The defendant further offers to prove that, by reason of the refusal of the railroad companies, mentioned in the assigned contracts, to permit the cars of the defendant to run over their respective lines of roads, the profits, income, and revenue derived from and under the only other and remaining railroad company mentioned in the assigned contracts, have fallen below the sum of $264,000 per annum, and the entire net revenue from the remaining line of road is less than $66,000 per annum, and the defendant gave notice of his intention to declare the contract null and void, and to surrender the demised property, unless the rentals should be reduced to a sum not more than $66,000, and of its election to pay such net revenue in lieu of the original rental.

"By Mr. Johnson:—I have no objection to that.

"The Court:—The court will first require evidence of the election. If you choose, you can put in writing a statement of what you relied upon to prove the option, and the court will rule whether it is competent evidence to prove it or not.

Mr. Bullitt:—Perhaps it will save time, for the present, to waive this point and go on upon another point, and we will be prepared in the morning, probably, to put it in a shape where it can be dealt with a little more intelligibly than it can now."

The matter was again renewed at a later period, as appears on page 80, when the following occurred:—

"Mr. Dickson:—We now desire to renew our offer as made on pages 142 and 143 of the notes, stating that the evidence already in of what passed between the parties was the evidence of the election upon which we rely.

"(Objected to.)

"THE COURT:—For the reason stated yesterday, the court sustains the objection, upon the ground that there is no evidence of an election prior to the commencement of this suit, either to return the property rented and held, or to pay over the net earnings referred to in the contract, in case a new contract was not agreed upon by the parties—no evidence that would justify the jury in finding such an election."

What the court stated, as to the failure of evidence, will appear by reading all that occurred between the first and the final offer. Under the eighth clause of the lease, there was no right in the lessee to elect to surrender the property, or to pay over any share of the net revenue, other than such a share as should be agreed upon. There was no such agreement. What share should be paid if the agreement of 27th February, 1885, was not a binding one? If it were competent for the lessee to offer to pay, in lieu of the $264,000 per annum, the whole of the net revenue which it should derive from the contracts and property which had been leased to it, there was no proof that it had elected to do so. On the contrary, it was urging that it had been agreed that it should pay, not the whole net revenue, but a fixed sum of $66,000 per annum. The pleadings raised no issue of fact as to whether or not there had been an election by the lessee to pay lessor the net revenue, in lieu of $264,000 per annum.

It was the duty of the defendant, if the revenue derived from the remaining contracts had fallen below $264,000, to do one of two things; either (1) declare the contract null and void and surrender the demised property; or (2), to pay in lieu of said sum of $264,000, such sum or share of the net revenues from the remaining lines of roads as the parties could agree upon.

It may be, though we only, for the purposes of the argument, concede it may be, that if the lessee did not care to surrender, it might have elected, if no agreement could be reached as to how much should be paid, to pay *all* the net revenues to the lessor after the date of exercise of the election.

Certainly, if it was not willing to pay all, the second branch of the option implied the necessity of an *agreement* as to the sum thereafter to be paid. To this agreement two parties were necessary—*i. e.*, the lessor and the lessee. The principle

upon which the agreement as to the sum must rest, was not prescribed in the original lease. Left unsettled as was this principle, it was not possible for any court to make the agreement if the parties failed to do so.

The lessee, by its plea and evidence, averred that there had been an agreement. The jury found that there had not been. If this verdict was reached in a case in which no errors of law can be found, it must stand as final.

It is certain that until the 1st of July, 1886, there was no surrender of the demised property. On that day, as appears by the record in 692, there was a tender, or pretended tender, of such surrender, and a declaration that the lease should be null thereafter.

How, under this state of affairs, was it possible for the court below to permit the jury to find that there had been an election to surrender or to pay a sum agreed upon, much less to pay what a court of equity should find to be an equitable share of the net revenues.

The modified agreement of 27th February, 1885, did much more than reduce the rental. It dealt with matters of the utmost importance, not permitted to be modified by clause 8, and released the defendant from very onerous obligations.

If the lessee could succeed in its attempt to set up this new agreement as binding upon the lessor, it would secure great advantages other than those of a reduction of rental. It made a most strenuous effort at success, and it failed.

It could not, before the jury, claim (1) that there had been an agreement to pay a fixed sum and to be released from divers obligations; and (2) that there had been no agreement to pay a fixed sum, but one to pay an equitable sum. It was not politic to press point 2 if it was possible to succeed in the first claim. Now that it has been defeated in such first claim, it seeks to escape through the medium of the second.

No hardship will follow if this court shall hold, as was held in the lower court, that until there was an election to pay the whole net revenue, or an agreement as to the sum to be paid, or a surrender, it was the duty of the lessee to pay at the rate of $264,000 per annum.

It will not do to say that the lessee upon the faith of the agreement, was induced not to surrender, and to make a binding contract with the Pennsylvania Railroad Company.

The contract with the latter was not executed until long after the modification had been repudiated.

The lessee knew, before it had executed the agreement of 27th February, 1885, that a meeting of stockholders had been called to decide whether or not the same should be approved. Almost at once it knew that it had been rejected. It was at liberty to surrender; but it did not do so until the first day of July, 1886. There was some cause for this long-postponed election. The lessor believes, it may be erroneously, for there is no proof before this court, in this case, upon which to rest the belief, that the income never fell below $264,000 per annum. If it is right in this belief, the explanation of the delay is easy. The point is one that will be very strenuously contended for when the issue is made.

The seventh exception appears on page 123.

A letter from the fourth vice-president of the Pennsylvania Railroad Company, Mr. John P. Green, to Mr. Atterbury, dated 2d March, 1885, was offered in evidence, for the purpose of showing a statement by the writer, "that at the time the matter was substantially closed." Whether or not at that time said matter was "substantially closed" was immaterial. If it was, the fact could not be proved by letters between third parties. It should have been substantiated by calling the writer, or by otherwise establishing the fact.

The letter itself, however, did not state that the matter was substantially closed; but simply that the last revises of the Pullman contracts, original and supplementary, were inclosed, which were understood to be in final shape, except that certain matters were yet to be agreed upon. The letter itself was immaterial, irrelevant and incompetent.

The eighth exception appears on page 124 of the Record.

Mr. Pullman had been cross-examined on pages 65, 72, 73, 76, and 77, as to why he had not contradicted, in his replies, certain statements made in certain letters which had been sent to him. These statements were of facts directly contrary to

those which he had sworn to in his examination-in-chief. By the cross-examination his attention was challenged to the fact that despite his assertion that he had accepted the modified agreement as a binding one, he not only had not contradicted written statements by the directors that it had been delivered to him on the condition it should be approved by the stockholders, but he had urged certain matters to be called to the attention of the stockholders at the meeting which was to convene.

The communications which were objected to when they were formally offered in evidence had all been previously read to him aloud, in full, before the jury, at the time he had been asked why he had made no contradiction of the assertions therein made to him. Even if the formal offer of what had been read was incompetent, it thereafter did no harm. It was competent, however, we submit, to put in proof letters which had been addressed to the lessee, and to which it had replied, in view of the fact that it appeared by such correspondence that statements of fact had been made, and had not been contradicted, which were in direct opposition to those to which the witness had sworn in his examination-in-chief.

The ninth exception appears on page 124.

The minutes of lessor's board of directors of 26th February, 1885, and 27th February, 1885, were offered simply for the purpose of showing what authority had been given to execute the modified agreement.

The board of directors had no power to act, saving by formal resolution. In the absence of a resolution which authorized the execution of the written agreement, there was no right to set it up as binding upon the corporation. It was the duty of the lessee to show, as a part of its case, that a resolution had been passed. If the seal dispensed with the necessity of such proof, preliminarily, it was only because such seal was *prima facie* proof that a resolution had been passed. It certainly was competent to show what the resolution was.

(*B.*) Exceptions to the charge.

I. The court affirmed plaintiff's third point (page 127), in these words:—

"If the resolution of the board of directors of the corporation plaintiff under the so-called modification was prepared, required the approval of the stockholders of the modified lease, it was not competent for the officers who delivered it to waive such requirement."

Certainly, if the board of directors had made it a condition of the modified lease that it should be approved by the stockholders, it was not competent for the officers who delivered it to waive such requirement. It would seem a waste of time to argue this proposition. The officers had only power to do what the directors authorized them to do. If we concede to them the power to do otherwise, we thereby confer upon them authority to do something beyond what had been delegated to them.

It is true that officers of a corporation, acting within the apparent scope of their authority, like any other agents, may do what the corporation, or the principal, had forbidden to be done. There must be, however, an apparent authority. It cannot be successfully argued that there was any apparent authority in the officers to modify the lease of 1870. The matter of estoppel, as dealt with in its charge by the court, will be considered later.

II. The court (page 127) refused to charge as asked in defendant's third point.

This point read thus:—

"That the resolution of April 21st, 1884, did not qualify, restrict, or control the discretion of the board of directors in agreeing to a modification of the terms of the original lease. On the contrary, it expressly authorizes them to make such an agreement as that of February 27th, 1885, and merely directed them, after the agreement was made, to report their action to the stockholders."

The court, at the request of the defendant, charged that the stockholders had no power to limit or restrict the power of the board of directors to deal with the question of the reduction of rental. It declined the request of the plaintiff to charge that this resolution did qualify the power of the board. After this had been done, the resolution, so far as the jury was concerned, became immaterial. Being told that it worked no restriction upon the power of the board, it was only necessary to find what the board had done.

The charge, however, clearly interpreted the stockholders' resolution. It is impossible to hold that a corporate resolution authorizing the making of modifications which are required to be submitted to the stockholders for approval, can be construed as meaning to give power to bind the corporation defendant before such approval is obtained. What possible good could result from a submission of directors' action to the stockholders for approval after the action had become final? The board of directors always construed this resolution as requiring them to submit their action, before it became binding, to the stockholders. It was for this reason that when they agreed upon the modification they provided simultaneously for the convening of the stockholders, to determine whether they would or would not approve.

III. The court (page 127) refused to charge as asked for by defendant's fifth point, which read thus:—

"That under the minutes of the board of directors, the president and secretary were authorized and empowered to execute and deliver the agreement of February 27th, 1885, as the act and deed of the Central Transportation Company."

How was it possible for the court to give this instruction? The resolution which it was asked to thus interpret, recited the resolution of the stockholders requiring the submission of the directors' action to them for approval, and, in authorizing the execution of the agreement, and in saying nothing about the delivery, it reads thus:—

"*Resolved*, That a meeting of the stockholders be called to be held on the 18th March, 1885, at 11 A. M., to whom shall be submitted the action of this board for their approval."

There is an exception (3) on page 134 to the charge of the court, in these words:—

"The minutes of the board, if correctly kept (and their correctness has not been questioned), show that on the twenty-sixth day of February the board approved of the proposed modification of the lease, and authorized the president and secretary to execute the necessary paper, without saying anything about delivering it—directing, at the same time, that a meeting of stockholders be held on the 18th March following, to which the action of the board in this respect should be sub-

mitted for approval. The construction of this written evidence is for the court, and we charge you that the authority thus conferred upon the officers did not authorize a delivery of the paper, except upon the condition that it be submitted to the stockholders for approval."

We will not further consider the exception thus taken to the charge, having met it by what we have already said. The matter is self-evident.

IV. The court (pages 127, 129) refused to charge, as asked for by the defendant's sixth point, which was in these words:—

"That if the jury find that the agreement of February 27th, 1885, was delivered to the president of the corporation without condition, and was accepted by him as a binding and final contract, on the faith of which the defendant entered into the new agreement with the Pennsylvania Railroad Company, such agreement would work the reduction of the rental to the rate of $16,500 a quarter, as therein specified, and their verdict should be for the plaintiff at that rate, with interest from the dates of maturity."

It answered thus:—

"The sixth point cannot be affirmed in the terms in which it is drawn, and I need say nothing further about it here, except that it is noticed in the general charge.

"If the jury find that the agreement of February 27th, 1885, was delivered to the president of the corporation defendant without condition, and was accepted by him as a binding and final contract, &c.

"I have already said I cannot affirm it in the terms here stated, because it does not go far enough. If the officer who did this had authority to do it, then the point is true; otherwise, it is not. It is disaffirmed."

In the general charge the court further dealt with this matter.

The affirmation of this point by the court would have amounted to a charge, that though the resolution of the directors did not authorize the delivery except upon condition, and that though it had been resolved that the agreement should not be binding until its approval by the stockholders, still it was competent for the president and secretary of the company to deliver said agreement as an absolute, binding one. We think we may leave the discussion on this point with a citation of what was said by the court on pages 130–132:—

There was no right to deliver or to execute unless the resolution conferred it. The resolution saying nothing about a delivery, made the execution dependent upon the stockholders' approval.

V. In considering the exceptions which were taken to the charge, it is impossible to take these up one after the other and to consider each in detail. By so doing, we would waste the time of this court and would be obliged to repeat, over and over again, the same observations. It will be best, we think, to deal with the general scope of the charge.

The learned trial judge charged the jury that it was their duty to find whether the officers who delivered the modified agreement had authority to deliver it, except upon condition of submission to the stockholders for approval; to find whether the officers had actually delivered it to the lessee, absolutely and without the condition of submission for approval. He further charged that the minutes of the board of directors did not authorize a delivery unconditionally and without approval of the stockholders; that if the assembled board of directors had informed Mr. Pullman they had passed a resolution which authorized the execution and delivery of the agreement without submission to the stockholders for approval, the lessor was bound as though an actual resolution to that effect was passed; but that it was not competent for any individual members of the board, nor for the officers of the corporation, to tell him, with binding effect upon the lessor, that something had been resolved upon which, in point of fact, had not been.

In the charge the court impartially directed the attention of the jury to the evidence, *pro* and *con*, and to the necessity of looking into all the circumstances of the case and into the action of the parties to the suit before and after the signing, for light upon the question of fact which the direct evidence had made so difficult of solution.

We will state certain propositions which, as we submit, were properly put to the jury.

First.—The officers had no authority to deliver the modified agreement until the stockholders had given their approval.

The directors had always asserted, as Mr. Bingham, the old president, swore, and as no one on the part of the lessee denied, that they would not bind themselves by any final action until after a submission to the stockholders. In the very same resolution in which they expressed their own opinion that it was proper to reduce the rental to $66,000 per annum, and in which they authorized an execution of an agreement to that effect, they recited the resolution of the stockholders and provided for their immediate convening for the purpose of determining whether or not the agreement should be approved.

There was some object to be furthered by the execution of the agreement immediately by the lessor, even though by such execution an unconditional binding should not result. This is evident from the fact that the lessee did not execute its copy of the agreement of modification until long afterwards, and not until, with its knowledge, the stockholders' meeting had been convened to pass upon the question of approval.

There was a controversy between plaintiff's counsel, Mr. Lane, and Mr. Pullman, as to whether or not there should be physically inserted in the agreement itself the condition that it should not be binding until approved by the stockholders.

The officers of the lessor did not insist upon the insertion, in the modification itself, of this condition; but in so doing they did not want to go outside of their authority and to waive the condition itself.

They did not agree to waive it. All the parties understood, or ought to have understood, that it was intended the stockholders should be convened to pass upon the question of approval. Mr. Pullman did not care that the condition should appear upon the face of the lease. Mr. Bingham swore that he said he would take the chances that the stockholders would approve it. Mr. Pullman and some of his witnesses swore that what he said was that he would take his chances, that the agreement would bind the stockholders, whether they did or did not approve.

The testimony raised a question of fact which it was necessary to submit to a jury.

There was no question, however, that the resolution did not confer upon these officers authority unconditional to deliver.

If Mr. Pullman thought that if he could obtain the agreement, though he should fail to secure the stockholders' approval, he could stand upon it as a concluded one, he had no authority thus to think from anything which was said to him by the board of directors.

It was his duty to demand a copy of the resolution. He knew that the officers were powerless to act unless there had been one.

Second.—The question of whether or not Mr. Pullman was misinformed as to the authority of the officers to deliver the agreement before approval by the stockholders, was one which arose under the evidence, and which it was necessary to submit to the jury. It was properly submitted to them, we think, by the court, which affirmed the fourth point of the defendant, in these words:—

"If the president of the defendant corporation was informed by the directors of the Central Transportation Company at the adjournment of the meeting of the board, of February 27th, 1885, that the agreement had been unanimously approved at the meeting of the board, and they would then and there deliver the agreement, but the seal was not there, and that they would execute and deliver it the next day, he was authorized to assume that the executive officers of the company had received power and authority to execute and deliver the agreement of February 27th, 1885, as the act and deed of the company; and if the minutes of February 26th, 1885, were not communicated to him, or either representatives of the defendant, the defendant would not be affected with notice of the terms of that minute."

Under the conflicting evidence in the case it would have been error for the trial judge to charge the jury that the directors had misinformed Mr. Pullman. It was the duty of the latter to ascertain what resolution had been passed. He did not inquire. No one denied that if the body which had the power to pass the resolution stated to Mr. Pullman that it had passed something which had not been adopted, such statement would have been as binding upon the corporation as though what had been stated to have been done had been really done. It was not competent, however, for any individual members of the board, nor for the executive officers of the corporation,

who had no authority to make the resolution, to bind the corporation as though it had been passed, by mis-statements.

The proper protection for any person or corporation, dealing with a corporation in a matter which requires a resolution of the board of directors of the latter, is either an actual resolution or a statement that a resolution has been passed by those who are authorized to estop a corporation from denying the truth of their statement. If an officer who signs an agreement without the necessary authority by the board of directors can bind the corporation by his assertion that the board of directors have passed the requisite resolution, there will be an end to every check upon unauthorized action. As well may an agent who has a written power of attorney which is limited, bind his principal by an assertion that his power is unlimited.

Third.—It was a question of fact, under the testimony, which was very contradictory, whether or not the officers had pretended to deliver the agreement unconditionally. It was necessary to submit to the jury for their decision this question of fact.

Mr. Bingham (page 34) had sworn :—

"We met by appointment at the Continental Hotel about ten o'clock I think, on Saturday, February 28th. Mr. Bullitt and Mr. Pullman were already there. Mr. Lane and I came in. The lease was lying on the able. Mr. Lane read it. I did not read it. He approached Mr. Bullitt, and he said: "I see nothing in here about the approval of the stockholders."

"Q. Who said that?

"A. Mr. Lane. Mr. Lane was the attorney of the Central Transportation Company He was president of the Pullman committee and was one of the directors. He said to Mr. Bullitt, 'There is nothing in this lease about the approval of the stockholders.'

"By The Court:

"Q. That is, the modified lease?

"A. Yes, sir; in what we called the modified lease. Mr. Bullitt's reply was 'No.' Mr. Lane said, 'I will introduce it,' and he approached the table—a short, small table—when Mr. Pullman said 'No; that's not necessary to do that; don't spoil it: I'll take the chance of the stockholders approving that," and I think he added that 'if they're sensible people, of course they'll approve it.

"I said to Mr. Lane that I thought perhaps we were not doing exactly the thing; that it was rather putting the cart before the horse to sign

this prior to the approval of the stockholders, and he answered me somewhat impatiently, that it was the way it had to be done. Of course, I said no more in reference to signing it.

"Q. You speak there as if Mr. Pullman knew that some approval of the stockholders would be necessary; on what do you base that?

"A. I understood him to mean that, of course, that he was to have the approval.

"(Objected to.)

"By MR. BULLITT:

"Q. State what he said.

"A. Well, that's what he said.

"By MR. JOHNSON:

"Q. At the prior negotiations and interviews, had anything been said to him about the approval of the stockholders being necessary.

"A. Certainly; I think at all our meetings with Mr. Pullman, that resolution of the stockholders had been mentioned and spoken of frequently—the resolution of 1884.

"Q. The one that was read here?

"A. Yes, sir.

"Q. Did you, or any of your board of directors, at any time speak to him about what you were doing being necessarily approved by the stockholders, or not?

"A. We always spoke to him in that way; there didn't seem to be any question about it.

"Q. About what?

"A. About the approval of the stockholders being necessary to fix it.

"Q. You say that he was aware of the fact that there had been this resolution of the stockholders passed?

"A. Certainly; he was aware of it."

What Mr. Bingham swore to was contradicted by other witnesses; but, even in this, contradiction, it was admitted that at the moment of execution there was a question raised. Mr. Pullman's private secretary, James H. Smith (page 118), swore:—

"A. Of my recollection the parties of the Pullman Company were in the room. Shortly afterwards Mr. Lane, Mr. Bingham and Mr. Cottringer came in, Mr. Cottringer bringing the seal of the company. The modified agreement was lying—the first I saw of it—was lying on the table; I don't know who brought it, but that is where I saw it; it laid there for a short time, and a general conversation occurred. It was then taken up by Mr. Lane from the table. Mr. Lane turned to Mr. Atterbury and said, in substance, that 'this contract does not show any reference to the resolution of the stockholders.' He says that 'we must insert something in this that will make it contingent on the ratification of the stockholders.'

"Q. Mr. Lane said that?

"A. Mr. Lane said that to Mr. Atterbury. Mr. Atterbury spoke up at once and very clearly, saying, 'No, no; Mr. Pullman will not assent to that; and Mr. Pullman, hearing his name, turned to Mr. Bingham, with whom he was in conversation—turned from Mr. Bingham and, I think, yourself to Mr. Lane and Mr. Atterbury, and stated that he would not, under any consideration, accept the modification with any question of that kind inserted. That is the recollection that I have. Then Mr. Pullman, Mr. Bingham, Mr. Lane, Mr. Atterbury, and, I think, yourself, joined in a conversation which I cannot report clearly, and it was finally—finally the paper was executed, Mr. Bingham signing it. Mr. Cottringer then affixed his seal and signed it, and Mr. Bingham then passed it to Mr. Pullman, and he took it and returned it to me."

Mr. Atterbury, the counsel of the lessee, when asked about the stockholders' resolution (page 104), swore:—

"Q. You saw the resolution, did you?

"A. I saw a copy of it, I suppose.

"Q. Who furnished you with that copy of the resolution?

"A. I can't tell you just when or how I first saw it——

"Q. But antecedently to this meeting at Mr. Lane's you had had a copy of the resolution?

"A. Yes, sir; I had seen it.

"Q. So that whatever your interpretation of it was, you were acting with actual knowledge of the words?

"A. Of that resolution.

"Q. Did any members of the board of directors at any time express any intention to assume the responsibility of acting contrary to that resolution?

"A. I do not know of any occasion on which any member of the board assumed to act contrary to that resolution.

"Q. Or contrary to it?

"A. I say, contrary to it.

"Q. Therefore may I take it that at the time this paper was delivered you had not been apprised by any member of the board that he individually, or the members collectively, had agreed to dispense with the requirements of that resolution?

"A. I recollect nothing that was said in regard to it at all?"

It would seem very clear that Mr. Pullman ought to have understood that the board of directors did not intimate to him that an unconditional resolution had been passed, when, at the very moment of execution, as his own witnesses admitted, Mr. Lane insisted on inserting in the modification itself the provision that it should not be binding until approved by the stockholders. How could Mr. Pullman have supposed that

there had been such an unconditional resolution when he knew that the counsel of the company wished it to appear that the requisite of an approval which, it had all along been understood was necessary, should be actually expressed in words? He must certainly have known that Mr. Lane would not have taken upon himself the responsibility of inserting this if the resolution had been unconditional, and had not required it.

As we have said, Mr. Pullman took away, unexecuted as to his own company, both copies of the agreement. He neither executed nor returned either until the tenth day of March. It can be hardly claimed that the agreement was executed until both parties had signed it. Under no circumstances did it become complete until it had thus been signed. It was incomplete, therefore, at the time that Mr. Pullman and his corporation knew the stockholders had been summoned to meet and to pass upon the question of whether or not they would approve.

Fourth.—There were irreconcilable differences of statement as to all that had taken place at the various crucial moments of the case. How was the jury to wisely decide which statement was true if it ignored the surrounding circumstances and the conduct of the parties before and after execution?

The learned judge was right in asking them to look into these circumstances, "the object which the parties respectively sought in view of their motives; the considerations under which they acted; their duties and obligations as respects others; and their conduct as it had been proven by their conduct before and after the transaction."

In April, 1884, the board was elected at the time the stockholders' resolution had been passed. Is it probable that this board would thereafter disregard the resolution, even though not bound by it legally? Is it probable that the board thus disregarded it, when it appeared that it had referred to this resolution in all the negotiations with Mr. Pullman; had recited it in its own resolution authorizing the modification to be made; and had immediately provided for a call of the stockholders to act by way of approval?

Was it likely that Mr. Pullman would reply to the communication of 21st March, 1885, without dissenting from what was therein stated as to the circumstances under which the agreement was executed, if this communication was untrue? It came, not from the new board, which was hostile to him, but from the very board which had acted and dealt with him.

Is it likely that he would have sent a representative to the first meeting of the stockholders, called to pass upon the question of approval, and would have sent a letter to be read at the next meeting, referring to the fact that an option given by the agreement would be extended, if he had supposed that this meeting was a farce, and that an agreement, meant to be conclusive and binding, had been executed?

Were not all the suggestions of matters to be considered by the jury, made by the trial judge, pertinent?

We submit, in the absence of any assignments of error or argument, showing the points which the plaintiff in error deems worthy to be pressed, that the learned judge in the court below presented to the jury with great accuracy the law which governed the case and the questions of fact which it was necessary to determine.

Having thus dealt with the exceptions which appear upon the record, we urge, further, that none of these exceptions injured defendant, because it appeared without contradiction that there had been a resolution of the corporation plaintiff which rendered it impossible for the board to make any modification.

It is true that the directors of a corporation are the managing body, and that, in the absence of prior action by the stockholders, they might have the power to do such an act as was done by the agreement of modification.

After all, they are only the *managing* body of a corporation. The stockholders in annual meeting convened are its owners.

Had the defendant been ignorant of what the stockholders had done, it might have been justified in acting on an unqualified resolution by the directors agreeing to a modification within the scope of their authority. It might not have been able to ascertain whether or not the stockholders had prelimi-

narily taken action upon the subject, because such action would not have been in the line of its inquiry. It might have dealt with the directors so long as it was without notice of a resolution. Admitting, however, as it did, that it was aware of what the stockholders had ordered, it could not disregard their action. The point which plaintiff put to the court as the first point for charge should have been affirmed.

The manufacturing act of 1849, under which this company was organized, and a copy of which is printed in the Appendix to No. 692, provides :—

"The stock, property, and affairs of said company shall be managed by not less than five, nor more than thirteen, directors, &c.

"The directors of such company, a majority of whom shall form a quorum for the transaction of business, shall keep minutes of their votes and proceedings, in a suitable book to be kept for that purpose; they shall have power to make such by-laws as they shall deem proper for the management and disposition of the stock and business affairs of the company, subject, however, to the revision and approval of the stockholders, and not inconsistent with the laws of this Commonwealth."

The contention by the defendant is that there was no power in the stockholders to require that what the directors should do by way of modification of the lease must have the approval of the stockholders.

The citation of the act, we think, shows that this contention has no foundation. It would have been clearly within the power of the stockholders to have so revised the by-laws as to require that no modification of the lease should be made without the approval of the stockholders. Was more than this done by the resolution of April, 1884?

Before concluding, we will refer, for a moment, to a suggestion that in this case the question of the validity of the original lease can be raised. No such question was raised in the court below. It cannot now be raised here, because this court has nothing before it but the lease itself, which does not contain within it the acts of Assembly which might or might not authorize the plaintiff to do what was done by the original lease. This reads thus:—

"Whereas, The parties hereto are engaged in the business of manufacturing railroad cars, generally known as sleeping cars, under certain

patents belonging to them respectively, and of hiring the same to railroad companies under written contracts, to be used and employed on and over the lines of the roads of said railroad companies, and receiving therefor income and revenue by the sale to passengers of the berths and accommodations therein;

"And Whereas, The demands of the public for increased means of personal comfort and convenience in traveling, of avoiding repeated changes of cars over long routes of railroads, the necessity for affording, at fair and reasonable rates, these advantages, which cannot be extended by railroad companies themselves, require that every possible means should be adopted to meet such demands, by avoiding the inconvenience and curtailing the expenses incidental to the maintenance to the business management and organization of two separate corporations;

"And Whereas, It is proposed that the party of the first part (having authority so to do under the act of the General Assembly of the Commonwealth of Pennsylvania, entitled 'An act to extend the charter of the Central Transportation Company, to empower them to lease their property and increase their capital stock,' and approved the ninth day of February, one thousand eight hundred and seventy, and duly accepted) shall demise, transfer, and set over unto the party of the second part, their successors and assigns, all their cars, contracts, and patent rights and personal property, and that the second party (having authority to do under the said act of Assembly, and by virtue of the powers in them vested by their act of incorporation from the State of Illinois) should take the same;

"And Whereas, At a meeting of the directors of the first party held at Philadelphia on the first day of February, one thousand eight hundred and seventy, and at a meeting of the directors of the second party held in Chicago on the sixteenth day of February, one thousand eight hundred and seventy, this present form of contract by and between the parties hereto was submitted for their approval, and, the same being by them at said meeting approved, the respective presidents were authorized, for and as the act and deed of the said parties of the first and second parts, duly to execute and deliver the same."

Will this court, in the case of a claim for rental of cars, patents, and contracts, earned during a period in which all were retained and used by the lessee, be asked to go outside of the record in a hunt for something which will enable a party who was defeated in a claim that an agreement to pay a rental of $264,000 per annum, had been reduced to $66,000 per annum to retain, without consideration, the property of the lessor?

JOHN G. JOHNSON,
For Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

PULLMAN'S PALACE CAR COMPANY,
Plaintiff in Error,
vs.
THE CENTRAL TRANSPORTATION COMPANY,
Defendant in Error.
NO. 190.

THE CENTRAL TRANSPORTATION COMPANY,
Plaintiff in Error,
vs.
PULLMAN'S PALACE CAR COMPANY,
Defendant in Error.
NO. 682.

ARGUMENT OF EDWARD S. ISHAM FOR PULLMAN'S PALACE CAR COMPANY.

WAYNE MACVEAGH,
JOHN S. RUNNELLS,
EDWARD S. ISHAM,
OF COUNSEL.

BARNARD & MILLHOUSE, LAW PRINTERS, CHICAGO.

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Defendant in Error.

No. 190.

THE CENTRAL TRANSPORTATION COMPANY,
Plaintiff in Error,
vs.
PULLMAN'S PALACE CAR COMPANY,
Defendant in Error.

No. 692.

ARGUMENT OF EDWARD S. ISHAM FOR PULLMAN'S PALACE CAR COMPANY.

WAYNE MACVEAGH,
JOHN S. RUNNELLS,
EDWARD S. ISHAM,
OF COUNSEL.

BARNARD & GUNTHORP, LAW PRINTERS, CHICAGO.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

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Before the month of February, A. D. 1870, the CENTRAL TRANSPORTATION COMPANY was a corporation created under the general law of Pennsylvania in December, 1862, "for the purpose of the transportation of passengers in railroad cars, constructed and to be owned "by the said company, in accordance with the several "letters patent issued to T. T. Woodruff." The original term of incorporation was twenty years.

An amendment was procured to this charter, by special act of the legislature of Pennsylvania, on February 9, 1870, which extended the corporate term for ninety-nine years from the date when it would otherwise expire, and authorized an increase of the capital stock. A copy of the charter and the amendment is appended for reference.

The company had in operation at the time spoken of sixteen contracts with various railway companies for the use of its cars, and was actually running them over their several lines of railway.* These contracts had been in operation for several years and had varying terms yet unexpired. It had also seventeen letters patent and one hundred and nineteen sleeping cars with their equipment.

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* List of railways included in the contracts.

Pennsylvania Railroad,
Northern Central Railway,
Baltimore & Ohio Railroad,
New York & Wash. Through Line,
Pittsburgh, Ft. Wayne & Chicago Railway,
Cincinnati, Ham. & Dayton,
Bellefontaine & Ind., and Indianapolis,
Pittsburg & Cleveland Railway,
Marietta & Cincinnati Railroad,
Central Ohio Railroad,
Indianapolis & Cincinnati Railroad,
Ohio & Miss. Railroad,
Col., Chicago & Ind. Cent. R. R.,
Terre Haute & Indianapolis Railroad,
St. Louis, Vandalia & T. Haute Railroad,
Jeffersonville, Mad. & Ind. Railroad,
Louisville, Cin. & Lex. Railroad.

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On the 17th day of February, 1870, the Central Transportation Company made a contract called a "lease" which is set out in the declaration in this case. It makes specific reference for the power of each of the parties to make such a contract, to their respective charters contained in certain acts of the General Assembly of the Commonwealth of Pennsylvania, and of the legislature of Illinois. By effect of such specific reference the contract is to be read as if the sections of those charters applicable to the subject-matter of the contract and its incidents were inserted in it. (*Elliott* v. *North Eastern R. C.*, 10 H. L. Cas., 333, 353; Broom's Leg. Max., 673.) The act of the General Assembly of Illinois is in the Session Laws of 1867, Vol. 2, at page 337. It is a public act, and a copy of it is appended for reference.

Material parts of the contract relative to the present issues, are shown in the following abstract of them:

This indenture, made this 17th day of February, 1870, between the Central Transportation Company, a corporation of Pennsylvania having their place of business in Philadelphia, of the first part, and Pullman's Palace Car Company, a corporation of Illinois, having their place of business in Chicago, of the second part.

Whereas, the parties hereto are engaged in the business of *manufacturing railway sleeping cars*, under certain patents belonging to them respectively, and *of hiring the same to railway companies*, under written contracts, to be used over their lines of railroad, and of receiving therefor income and revenue by sale to passengers of berths and accommodations therein; and

The business in which both parties are engaged.

Whereas, the demands of the public for increased means of personal comfort and convenience in traveling, of avoiding changes of cars over long routes, the necessity of affording, at reasonable rates, these advantages which cannot be extended by the railway com-

The inducement to the contract.

panies, *require avoiding the inconvenience and curtailing the expense incidental to the maintenance of the business of two separate corporations;* and

Whereas, it is *proposed* that the first party (having authority so to do under an act of the General Assembly of the Commonwealth of Pennsylvania * * * and duly accepted), shall demise, transfer and set over to the second party *all* their *cars, contracts and patent rights and personal property,* and that the second party (having authority so to do, under the said act of assembly, and of their act of incorporation by the State of Illinois), should take the same.

Reference to the legislative authority, and the subject-matter to be leased and transferred.

Now, this contract witnesseth: That said first party hath granted, demised, transferred and set over unto the second party, and the second party take, 119 cars with their equipment, sixteen railway contracts for the operation of said cars, seventeen patent rights secured by letters patent, "and *generally all* their personal property, rights, credits, moneys and effects, rights of action, moneys due and to become due from licenses heretofore granted; to have and to hold" the same, and all income and profit therefrom, as follows: the 119 railway cars for ninety-nine years from the 1st day of January, A. D. 1870; the railway contracts and patents during the time of their existence; and all the said personal property, etc., during the said term of ninety-nine years.

The demise.

Duration of the lease.

In consideration whereof, the second party covenants to pay the first party annually the sum of $264,000 during the entire term of ninety-nine years, in quarter-yearly installments of $66,000, the first quarterly payment to be made April 1st, 1870.

The rental.

In the event of failure by second party to pay any installment of rent and of default therein for thirty days, the first party may, at its option, terminate the contract and resume its property; but this shall not release the second party from liability for damages arising from breach of contract or default.

Option to Central Tr. Co. in case of default in rent.

No assignment to be made without consent of Central Company, nor any lien to take precedence of its rights under the lease, or interfere with its right to retake the property under the terms of the lease.

The right to retake the property not to be embarrassed.

"6. That the parties hereto shall and will, at all proper times and manner exert their influence to obtain renewal or new contracts with said railroad companies, for and in respect to the use and employment of the cars of the second party, on and over their lines of railroad in carrying on their said business, *and the first party shall and will not engage in the business of manufacturing, using, or hiring sleeping-cars while this contract remains in full force and effect.*"

Covenant of Central Tr. Company to do no business under its charter.

"8. In the event that any of the railroad companies mentioned in the assigned contracts shall at any time during this agreement refuse to permit the cars of the second party to be run on and over their respective lines of roads, so that by reason of such prevention or refusal, the profits, income, revenue derived from and under any other and remaining contracts with other and remaining railroad companies, mentioned in the assigned contracts shall fall below the sum of two hundred and sixty-four thousand dollars ($264,000) then and in that event said second party shall *have the right either* to declare this contract null and void, and surrender to said first party the said hereinbefore demised property, *or shall* and will *pay* in like manner, *in lieu of* the said sum of two hundred and sixty-four thousand dollars ($264,000), such sum or share of the net revenues from the remaining lines of roads as the parties hereto may at that time agree upon."

Option of Pullman Co. in case rent cannot be earned.

At the end of ninety-nine years, second party is to redeliver the said 119 cars, furniture, bedding, bed-clothing, in like good order as the same now are, with such additions, betterments and improvements as shall have been made, and also the other demised property.

The cars, etc., to be redelivered at end of 99 years.

Before the 17th day of February, 1885, nearly all the

railway contracts that were assigned, and among them that with the Pennsylvania Railroad Company, had expired, and transactions occurred between the parties looking to a re-adjustment of the rate of payment, under the provisions of that section of the contract known as *Section Eight*. That section provides for the contingency that the amount reserved cannot be earned under the contract. We shall be obliged to investigate those transactions presently in another branch of this argument, for the special questions in number 190 arise out of them. For the present it is enough to say that as the result of them the Pullman Company claimed that the parties had conclusively agreed upon a new annual payment of $66,000 per year. The Central Company denied the obligation of that agreement, because it had been assented to by its directors only and not by the stockholders. It then insisted that, as the agreement upon that subject had failed by this refusal, the parties were remitted, not to a reconsideration of its proper share of net revenue under the provisions of section "*Eight*," but to the original obligation to continue to pay $264,000 per annum, *whether it could be earned or not*, and as if the section "*Eight*" were to have no operation or effect.

With that view, the action in number 190 was brought to enforce the collection of two installments of the annual payment accruing April 1 and July 1, 1885. Afterwards the action in number 692 was brought for enforcement of the same covenants by collection of three installments, accruing prior to July 1, 1886.

THE CONTRACT WAS VOID BECAUSE *ULTRA VIRES* AS TO BOTH CORPORATIONS, AND VIOLATIVE OF PUBLIC POLICY.

In that second suit a special plea, and also an objection to the introduction of the contract in evidence, raised directly the question of the legality of the contract. The objection is thus shown in the record: "To this offer "counsel for the defendant objected on the ground that "it was beyond the power of either corporation to make "the contract, and also because it was null and void by "reason of its being in restraint of trade and against "public policy as preventing competition."

We here assign for error, in number 190, that the court entered judgment for the plaintiff below upon the contract notwithstanding it was void for the reason stated in that objection.

As that issue is common to both the cases, and is the only issue in one of them, it is that which we ought first to consider.

No more lucid statement can be made of the situation which these actions present than that made by the court below in the opinion filed. There it is thus stated:

"The plaintiff, an incorporated company authorized "by its charter 'to transport passengers in railroad cars "constructed and owned by itself, in accordance with "certain patents,' entered upon the business for which "it was incorporated, manufactured a large number of "cars, entered into contract with numerous railroad "companies, and commenced the running of its cars "upon their roads. The defendant was engaged in the "same business—running similar cars upon railroads for

" the accommodation of passengers—and was probably
" the plaintiff's principal competitor in the business.

" The two companies, finding it desirable for the pro-
" motion of their interests to avoid competition, resolved
" to form a combination (in order that they might have
" a monopoly of the business), whereby the defendant
" would take the cars, leases, patent rights, and other
" property of the plaintiff and hold it for a period of
" ninety-nine years; in consideration of which and of
" the plaintiff's agreement to discontinue business and
" cease competition in order that the defendant might,
" so far as it was concerned, have a monopoly in this
" respect, the defendant undertook to pay the plaintiff
" the sum of $264,000 per annum in quarterly install-
" ments. By the contract here in suit that arrangement
" was carried into effect. That it was and is invalid un-
" less authorized by legislation we entertain no serious
" doubt."

The first proposition is that this contract falls strictly within the principle of *ultra vires*. It is one of those out and out alienations or dispositions of the whole property and powers of the Transportation Company which to be valid must be supported by express legislative permission to *each* party to the transfer, and the permission must affirmatively appear in the case of *each* party.

It is such a contract as is forbidden primarily, and stands forbidden, as to both companies, until authority to each is affirmatively shown; for what has not affirmative permission is forbidden.

Thomas v. *Railroad Co.*, 101 U. S., 71.
Davis v. *Old Colony R. R.*, 131 Mass., 258.

Middlesex R. R. Co. v. *Boston & Chelsea R. R. Co.*, 115 Mass., 347.

Penn. Co. v. *St. Louis, Alton, &c., R. R. Co.*, 118 U. S., 630.

Chicago Gas, &c. Co. v. *Peoples Gas &c. Co.*, 121 Ill., 530.

O. & M. R. R. Co. v. *Dunbar*, 20 Ill., 623.

Balsley v. *St. L., Alt. & T. H. R. R. Co.*, 119 Ill., 72.

The second proposition is that this contract falls strictly within the rule that where a corporation has been given by charter franchises and powers of a public character to enable it to perform certain public services, for example, "*to enable it to provide the facili-*" *ties to communication and intercourse, required for the* "*public convenience*" (*York & Maryland Line R. R. Co.* v. *Winans*, 17 H., 39), such public services are public *duties*, and are "a remuneration to the community for "their grant;" and "the corporation cannot absolve it-"self from their performance" without legislative consent. (*Ib.*) A contract which *disables it* to perform them is therefore void.

Thomas v. *R. R. Co.*, 101 U. S., 83, and *cases cited above.*

People ex rel. v. *Chicago Gas Trust*, Ch. Leg. News, Dec. 7, 1889.

The franchises given by charter to the Transportation Company are of this public character, and so are the services it is incorporated to perform. It is incorporated for the *transportation of railway passengers*, in cars of special construction and *of its own manufacture.* (Rec., No. 690, p. 72.) These functions are public in their nature.

York & Maryland Line R. R. Co. v. *Winans*, 17 How., 39.
Black v. *Del. & Rar. Canal Co.*, 22 N. J. Eq., 130.
Munn v. *Illinois*, 94 U. S., 130.
Pickard v. *Pull. South'n &c., Co.*, 117 U. S., 34.

The disability imposed by this contract upon any performance of its public services by the first party is absolute. It is a *transportation* company; incorporated in the language of its charter "for the transportation of rail-"way passengers" in cars of its own manufacture under special patents; and it assigns *all* its cars, patent rights, railway contracts, and all moneys and all other resources—everything necessary for use in its business,—and covenants specifically not to manufacture or do any business under its charter for the whole period, 99 years, of the contract term. So far as the contract goes the disability created is absolute.

The authority by which it is claimed that this contract may be supported is that clause of the amendment to the charter which provides that "said company are "hereby empowered to enter into contracts with corpo-"rations of this or any other state for the leasing or "hiring and transfer to them of their railway cars and "other personal property, and shall have power to in-"crease their present capital stock two hundred thous-"and dollars."

This presents a question of the sufficiency, for the present purpose, of what was intended by the legislature in the clause which is now invoked to uphold what the

parties have done; and this is a question of what the legislative intent can be thought to have been under the *special circumstances at that time.*

The *special* circumstances were that a corporation *then actively engaged in the business* of transportation by sleeping cars, for which it had been created, was applying for an extension for ninety-nine years of its charter, and for *an increase of its capital*, in connection with such powers as were thought to be *expressed* in the language of the clause now under consideration.

Such an application was equivalent to a declaration to the legislature that the *purpose* of the corporation was to *enlarge its business*, and to *prolong its business activities*, and that for that object it sought to increase its investment by creating more capital, and to extend its corporate term. No other reason is alleged, and for no other reason could it be *assumed* to want an extension of time or, especially, an increase of its capital.

The act of the legislature must be construed in the light of that affirmatively declared purpose. "The general duties of all corporations," says Blackstone, "may be reduced to *this single* one; that of *acting up to the end* or design, whatever it be, for which they were created." 1 Blk. Com., *480. What was the end or design for which this corporation had been created? What indicated that it was not proposing *to act up to that design?* That was in effect the affirmative declaration of the corporation. The legislature *contemplated* the continued exercise of the corporate powers, and it authorized that and *nothing else.* Nothing in its action or the attitude of the company justifies belief that an idea existed, that upon acquisition of the new powers the corporation was to instantly suspend forever its corporate action, and

disable itself forever by contract from performance of every corporate function and every public duty. It is not rational to construe the clause as an intended license to abandon, and by *one* contract extinguish, the new corporate powers just given.

Such a departure from the chartered purpose cannot be held to be authorized unless it be done expressly. A primary power cannot be *given* by implication. Implication can avail only to make effective a power *already expressly* given without ambiguity or doubt. The power itself cannot be raised by implication. That must be express and clear.

In *People ex rel.* v. *Chicago Gas Trust*, Chicago Legal News, December 7, 1889, the Supreme court of Illinois has just said:

"Corporations can only exercise such powers as may "be conferred by the legislative body creating them, "either in express terms or by necessary implication; "and the implied powers are presumed to exist to en- "able such bodies to carry out the express powers "granted, and to accomplish the purposes of their crea- "tion. *C. P. & S. W. R. R. Co.* v. *Marseilles*, 84 Ill., 643; "*Chicago Gas Light Co.* v. *People's Gas Light Co.*, 121 Ill., "530.

It is perfectly well settled that *any ambiguity* in the terms of a charter *must operate against the company* and in favor of the public. *Stourbridge Canal* v. *Wheeley et al.*, 2 Barn. & Ad., 793; *Charles River Bridge* v. *Warren Bridge*, 11 Pet., *544; *Oregon Ry. Co.* v. *Oregonian Ry. Co.*, 130 U. S., 26. "In this court the principle is recognized that in grants by the public *nothing passes by implication.* * * * One of the most important powers with which a

corporation can be invested is authority to sell out its whole property, together with the franchises under which it operated, *or the authority to lease its property for a long term of years.* * * * Naturally we would look for the authority to do these things in some express provision of law. We would suppose that if the legislature *saw fit to confer such rights* it would do so in *terms which could not be misunderstood.*" *Oregon Ry. Co.* v. *Oregonian Ry.*, 130 U. S., 30. What possible reason can there be to suppose that the legislature was intending to authorize the immediate suppression and practical extinction of all the functions of a corporation actively engaged in its business at the moment, by language conferring active powers in terms descriptive strictly of the company's actual business, and by increasing its capital, and extending its charter so as to provide for an existence of a hundred years to come?

Thomas v. *Railroad Company*, 101 U. S., 71.
Middlesex R. R. Co. v. *Boston & Chelsea Co.*, 115 Mass., 347.
Oregon Ry. Co. v. *Oregonian Ry. Co.*, 130 U. S., 1.
Chicago Gas, &c., Co. v. *Peoples Gas, &c., Co.*, 121 Ill., 530.

In no possible aspect is the charter clause commensurate with the scope of this contract. It nowhere empowers one sweeping alienation of all the corporate resources. It nowhere empowers an alienation of all the corporate property for nearly all the corporate life-time. It nowhere contemplates any contract that will disable the corporation to perform its own functions and duties.

While such was not the intent in this amendment to

the charter, it is *equally clear what the intention* was. Compare with the terms of the original charter, the statement in the contract of the business the Central Transportation Company was then, when the contract was made, actually engaged in. It is this:

"WHEREAS, The parties hereto *are engaged in the business* of manufacturing railway cars, generally known as sleeping-cars, under certain patents belonging to them respectively, *and of hiring the same to railroad companies* under written *contracts* to be used and employed on and over the lines of the roads of the said railroad companies, and receiving therefor income and revenue by the sale to passengers of the berths and accommodations therein."

By the original charter, in December, 1862, the corporation was "formed for the *purpose* of the *transpor-* "*tation* of passengers in railroad cars constructed and "to be owned by the said company," under special patents. It was organized for the special function of *transportation* in its own cars. *That* was to be *its business*. It called itself a Transportation Company. Six years afterwards it recites in this contract that it is "engaged in the *business of hiring its* "*cars to railroad companies* under *contracts*, to be used "and employed over their lines of road." This is precisely (and almost in the very words), the business indicated by the amendment to the charter, where the company is empowered "to enter into contracts with "corporations of this or any other state for the leasing "or hiring and transfer" of their railway cars or other personal property. The amendment simply *supplements the original grant*, so as to comprise what had then come to be the established form of conducting the sleeping-car business. It had become *a system of contracts* with railway companies *for leasing or hiring* the

cars to them, to be used in transporting their passengers, and compensation was derived for the use of the cars, by the special privilege of selling accommodations on them. Such contracts are "contracts for leasing or hiring the cars" to the railway company; and reference to *such* contracts with corporations, and such only, is consistent with the subordinate details of the language of the act. The *capital* of the Transportation Company *was increased* for the sake of the business intended by the amendment. Such contracts are consistent with and actually constitute that business. But "contracts," not "a contract," and with various railways, constitute that business and are contemplated; not a single sweeping contract of alienation which would *destroy the power to do this business.* The amendment simply supplements the terms of the original charter, and describes the ordinary scope of the operations of a sleeping-car company.

In this respect this case falls singularly into analogy with the construction declared by this court in the case of *Thomas* v. *Railroad Co.* The clause of the thirteenth section of the company's charter there invoked might far more plausibly be thought to comprise the power that was asserted, and the language of this court upon that subject has a very pertinent application here. An assignment of the entire property and resources of a corporation, coupled with a covenant not to engage at all in business under its charter, is at least the equivalent of an assignment of its property and franchises. In that case this court said:

"The authority to make this lease is placed by counsel primarily in the following language of the thirteenth section of the company's charter:

"'That it shall be lawful for the said company, at any time during the continuance of its charter, to make contracts and engagements with any other corporation, or with individuals, for the transporting or conveying any kinds of goods, produce, merchandise, freight, or passengers, and to enforce the fulfilment of such contracts.'

"This is no more than saying 'you may do the business of carrying goods and passengers, and may make contracts for doing that business. Such contracts you may make with any other corporation or with individuals.' No doubt a contract by which the goods received from railroad or other carrying companies, should be carried over the road of this company, or by which goods or passengers from this road should be carried by other railroads, whether connecting immediately with them or not, are within this power, and are probably the main object of the clause. But it is impossible, under any sound rule of construction, to find in the language used a permission to sell, lease, or transfer to others THE ENTIRE ROAD, and the rights and franchises of the corporation. To do so is *to deprive the company* of the *power of making those contracts which this clause confers and of performing the duties which it implies.*"

But even if authority for this contract could be found for the Transportation Company, that of itself would not be sufficient to uphold it. Equivalent power must be affirmatively shown in the other party to it, the Pullman Company. It cannot be presumed. It will not be implied. It must clearly and affirmatively appear. This rule upon this subject has been laid down with equal emphasis and distinctness by this court, and by the Supreme court of Illinois from which state the Pullman Company derives its charter.

Penn. Co. v. *St. Louis, Alton, &c., R. Co.*, 118 U. S., 290.

Oregon Ry. Co. v. *Oregonian Ry. Co.*, 130 U. S., 1.

Peoria, &c., R. R. Co. v. *Mining Co.*, 68 Ill., 489.

Chicago Gas, &c., Co. v. *Peoples Gas, &c., Co.*, 121 Ill., 530.
People ex rel. v. *Chicago Gas Trust*, Chicago Leg. News, Dec. 7, 1889.

The charter of that company is a public statute of Illinois, and is appended for reference. An inspection will show it to be utterly barren of any suggestion of such corporate power.

This would be the result even if the terms of the contract had stopped at this point. No legislative permission can be found for this immediate alienation of all the property, contracts, money and resources of the Transportation Company, for nearly the whole period of its corporate life. Such an entire alienation was strictly *ultra vires*, and it violates also the principle that a corporation having duties of a public nature to perform cannot lawfully, disable itself from their performance.

No statute authorized the covenants to cease business, and to destroy competition.

But the unlawful elements of this contract are not confined to these. The Transportation Company not only disabled itself from performance of its corporate duties, but it made a special covenant to cease business during practically its entire existence. The contract was for ninety-nine years, and it covenanted not to "engage in the business of *manufacturing, using or hiring* sleeping cars" during the continuance of the contract. That embraced the entire scope of its powers under its original and amended charter. Moreover, it covenanted to exert iteslf to obtain for the other party to the contract re-

newals or new contracts with railroad companies for the use of the cars of that other party. As in *Gibbs* v. *Baltimore*, 130 U. S., 406, it recited in its contract that the inconvenience incident to competition between the two companies could be avoided with advantage. Its directors reported to the stockholders in these words the object to be accomplished, viz: to "terminate a con-"flict that was prejudicial to the interests of the stock-"holders of both companies and endangered the per-"manency of the sleeping-car business. The directors of "both companies entertaining this view appointed com-"mittees to consider the subject and agree upon some "plan for accomplishing the object sought." (*Rec., No.* 190, p. 28.)

And this agreement that it would, to the extent of its power, establish the monopoly of the other party and absolutely discontinue, for that purpose, its own business, were material elements in the consideration for which the other party to the contract undertook the covenants on its own part. They cannot be separated. This covenant is absolute; it has no practical limitation as to time or place. The rule that covenants in restraint of trade are void is, in its full common law form, the law of Pennsylvania. *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. St., 173. "The general rule is that all restraints of trade, if nothing more appear, are bad." *Keeler* v. *Taylor*, 53 Pa. St., 468. That is the law of this Pennsylvania corporation. It is also the law of Illinois, from which state the other party to the contract derives its incorporation. *Chicago Gas, etc., Co.* v. *Peoples' Gas, etc., Co.*, 121 Ill., 530. Moreover, courts will refuse aid to a contract imposing any restraint whatever where the business is public in its

character, so that any restraint may prejudice not only the individual restrained, but also the public interest.

Gibbs v. *Baltimore Gas Co.*, 130 U. S., 409; *Chicago Gas, etc., Co.* v. *Peoples' Gas, etc., Co.*, 121 Ill., 545; *Craft* v. *McConoughy*, 79 Ill., 350; *People* v. *Chicago Gas Trust*, Chicago Legal News, December 7, 1889.

The question is not so much what is actually accomplished in a particular case; the law looks to the general tendency of the power: Greenhood on Public Policy, page 5; *Richardson* v. *Crandall*, 48 N. Y., 343; *Salt Co.* v. *Guthrie*, 35 Ohio St., 666; *People* v. *Ch. Gas Trust supra.*

There is nothing uncertain in the law of Illinois, any more than in Pennsylvania, upon this subject. In *People* v. *Chicago Gas Trust* the Supreme court has just said:

> The word "unlawful," as applied to corporations, is not used exclusively in the sense of *malum in se, or malum prohibitum.* Is is also used to designate powers which corporations are not authorized to exercise, or contracts which they are not authorized to make, or acts which they are not authorized to do; or, in other words, such acts, powers and contracts as are *ultra vires. Franklin Co.* v. *Lewiston Sav. Ins., supra; Oregon Ry. Co.* v. *Oregonian Ry. Co., supra.* * * *
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> Whatever tends to prevent competition between those engaged in a public employment or business impressed with a public character, is opposed to public policy, and therefore unlawful. Whatever tends to create a monopoly is unlawful, as being contrary to public policy. 2 Addison on Cont., 743; Greenhood on Public Policy, pages 180, 643, 654, 655, 670; *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Penn. St., 173; *Craft* v. *McConoughy*, 79 Ill., 346; *Central R. R. Co.* v. *Collins*, 40 Ga., 582; *Hazlehurst* v. *Savannah R. R. Co.* 43 Ga., 13; *Trans. Co.* v. *Pipe Line Co.*, 22 W. Va., 600.
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> In *Craft* v. *McConoughy, supra*, where the opinion was delivered by Mr. Justice CRAIG, we said:
>
> "We understand it to be a well settled rule of law, that an agreement in general restraint of trade is contrary to public policy, illegal

and void, etc. * * * Whatever is injurious to the interest of the public is void on the ground of public policy."

In *Salt Co.* v. *Guthrie, supra,* the Supreme court of Ohio said:

"Public policy unquestionably favors competition in trade, to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies, which tend to advance market prices to the injury of the general public." * * *

The common law will not permit individuals to oblige themselves by a contract, either to do or not to do anything when the thing to be done or omitted is in any degree clearly injurious to the public. *Chappel* v. *Brockway,* 21 Wend., 157; *Transportation Co.* v *Pipe Line Co.* 22 W. Va., 600. In *Stanton* v. *Allen,* 5 Denio, 434, an agreement, whose tendency was to prevent competition, was held to be void by the principles of the common law, because it was against public policy and injurious to the interests of the state. * * *

We held in *Chicago Gas Light Co.* v. *People's Gas Light Co., supra,* that, for the reasons there stated, a contract between two of these four companies, the effect of which was to stifle competition between them and necessitate an abandonment of their public duties, was against public policy and could not be enforced.

Now it is plain that no court would ever affirmatively enforce for the Pullman company a specific performance of the terms of these covenants. Yet they enter into the whole contract, and are the essential and substantial part of it, without which it would never have been made. No court would hold the Central Transportation Company bound by them. If to-morrow it should provide new capital, and attempt to resume the business of manufacturing cars, or of hiring them to railways under contracts *for the public service of transportation,* every court would refuse on grounds of public policy to prohibit this by injunction. The contract in its most material elements is not obligatory nor enforcible against one party, and of course it is equally void as against the other.

We are not denying an obligation to make compensation for benefit actually derived under executed portions of the contract; but the payments reserved in the contract would not be the proper measure of that obligation. The so-called "rental" represents compensation for other things than use of demised property. The frail and old-fashioned cars have long been useless. The blankets and other equipment passed long ago into the inevitable limbo of all things that are consumed in the using. The patent rights are gone. The railway contracts have all expired, except so far as one of them may be held to survive in the existing contract with the Pennsylvania Railroad Company. The substantial thing that remains is the agreement, for the future, of the Central company to do no business under its charter. This is the chief consideration for the "rental" agreed to be paid. It would not have been agreed to with that company free for active competition, and this element cannot be separated. Plainly it follows that no part can be accounted "executed" until the whole term is ended, even for an installment that has accrued. The company has desisted from business thus far, but the covenant is that it shall desist for ninety-nine years, and a part of the price is paid for that covenant for the future. The present actions are for installments which include that price, but that covenant is not performed, and it may never be. It is not obligatory. No court would enforce it for the Pullman company. The Central company may abandon it at will, and resume its business tomorrow.

But the present is an action to enforce on its behalf a specific performance of the very contract. To that we say that no action founded on the contract, even

if for a part fully executed, one in which judgment for the plaintiff would be an affirmative enforcement of the contract itself, can be supported. It is a conclusive answer to any claim to the contrary, that it would disable a court of law from *ever* refusing its aid to the enforcement of unlawful contracts. It must always enforce them. For an action is always brought upon some alleged obligation that has already matured by partial execution of the contract by the other party; as for example, to collect an installment of rent for a period during which the defendant has already had the use of the property. In such case the contract may be said, for that past period, to have been performed on one side. The same situation will exist again when suit is brought for the next installment, and thus, step by step, the machinery of judicature would be irresistibly brought to enforce the most unlawful contracts to their very end.

This court has too often held that contracts, which are unlawful and void, for such reasons as are adduced in the present case, derive no confirmation or validity from the circumstance that the parties have concurred for any period of time in their execution, to leave any force in any defense of the contract based upon that suggestion. On the contrary, it has expressly declared that "having entered into the agreement it was the duty of "the company to rescind or abandon it at the earliest "moment." *Thomas* v. *Railroad Co.*, 101 U. S., 86.

II.

THE UNDERTAKING DECLARED ON HAD BEEN SUPERSEDED BY PROCEEDINGS UNDER SECTION "EIGHT," AND CONSTITUTED NO CAUSE OF ACTION.

We submit that it was error to hold that the obligation to pay the original "rental" of $264,000 was in force, notwithstanding the action which resulted in the contract of February 27, 1885, called the "modified lease;"

And also, that it was error to hold that the question of an *election* was one of fact, and then refuse to submit to the jury the evidence as to whether an *election* had been made between the two alternative rights given the Pullman company by said Section *Eight*;

And that it was error to hold that the acts of the parties, shown by the minutes of the directors' meetings of the Transportation company of February 26 and 27, 1885, and by the agreement of February 27, 1885, called the modified lease, did not effectively constitute in law an election by the Pullman company, under the provisions of Section *Eight*;

And that it was error to permit the use of parol evidence to contradict the absolute purport of the minutes of the directors' meetings of February 26 and 27, 1885, or to qualify the act of delivery of the modified lease as an executed contract. (Rec., 19, 45.)

This makes necessary some further statement of facts from the record.

Statement.

On January 27, 1885, the contract with the Pennsylvania Railroad Company expired. This was substantially the last of the assigned contracts. With it ended, in the language of Section *Eight*, all the "profits, income, revenue "derived from and under any contracts with railroad "companies mentioned in the assigned contracts." All hope of any such revenue in the future depended upon the chances of a new contract with the Pennsylvania company, and one thing was definitely understood by every one, that even if any contract at all could be secured, it would be upon terms that would make impossible any earnings approaching in amount those of the past. (Rec. No. 190, pp. 17, 22.) This situation had long been foreseen, and as early as April, 1884, the stockholders of the Transportation company, at their annual meeting, passed this resolution: "*Resolved*, that the "Board of Directors be, and they are hereby, *author-* "*ized* to make any *modifications* to the existing lease "with the Pullman's Palace Car Company if, in their "judgment, *modifications or changes* are deemed neces- "sary, and to submit their action in that behalf to the "stockholders for their approval."

The indications are obvious on the face of the lease that, as to the rental of $264,000 per annum, *it was never expected or intended that it should be paid, unless it could be earned from the contracts assigned by the lease.* It was to meet this condition that the *Section Eight* was introduced.

Time and the negotiations developed what sort of

contract could be had with the Pennsylvania railway, and the negotiations beginning early in 1884, if not in 1883, continued to February 28, 1885. The elements that distinguished it from the former are indicated in the record. The Pennsylvania railway refused a concession to the Pullman company of any contract under which that company should be able to earn more than six per cent. upon its capital investment, for the Pennsylvania company said that under a car trust they could provide their own cars at five per cent. (Rec., 51.) To reduce the contract with the Pullman company to this basis, was the guiding purpose in the requirements of the railway company. While details were not concluded, all substantial elements of the new contract were known before the old contract expired on the 27th of January, 1885, and negotiations were concurrent with the Transportation company as to the necessary "*modifications or changes*" of the original lease. These words, "modifications or changes," signify in their ordinary use and meaning, new elements changing the terms and effect of the contract, and made from the time of their introduction a part of the lease itself; and on the 26th and 27th days of February, 1885, the parties agreed upon a supplemental contract called a "Modified Lease," which embodied the changes in the original lease made necessary by the new railway contract. Specifically they were: (1.) In the new contract the railroad company reserved a right to terminate the contract at certain intervals of time during its duration, and the lease was "modified" by a provision that in the event of such action by the railroad company the lease itself should terminate at the same time. (2.) The railroad company reserved right to it-

self to take a share and become a participant in the business of the Pullman company under the contract, whereby the earnings of the Pullman company thereunder would again be proportionately reduced, and the lease was correspondingly modified by a provision that in that event the annual payment to the Central Transportation Company should be proportionately reduced. (3) The original lease provided for compensation to the plaintiff only by the payment of rental or of a share of net earnings specifically in money; but the parties agreed upon a compensation consisting of the sum of $66,000 per year, together with a right of the stockholders of said plaintiff to exchange their stock for shares of stock of the defendant company; and the lease was modified by a provision for that form of compensation.

This contract itself is shown in the record at page 16, and the minutes of the directors' meeting, at which it was approved, are shown on pages 124 to 126.

While these negotiations were taking place the time arrived when there could be no further delay in the contract with the railway company, and when the arrangements with the Transportation company must be definitely concluded, or the possibility of any railway contract at all would be lost. The Pullman company was advised by the president of the railway company that it should decide to make or not to make the contract settled and proposed, before the time of the annual meeting of the railway company. The definite answer had to be given on the 28th of February, and of this the Transportation company was advised. (Rec. p. 54-55, 90, 123.) The directors referred to the stockholders' resolution of April, 1884, and desired to submit their concurrence in

the new agreement to a meeting of their stockholders; but to this the officers of the Pullman company gave a flat refusal. They insisted that the directors had power to act conclusively upon the matter, and that the stockholders had no power to control them by their resolution even if that had been their purpose; and it is plain there was no time for such a submission when the issue must be determined at once whether there should be any railway contract or not. Failure to make a railway contract would be the end altogether of any revenue to the Transportation company under the lease, and the parties were under compulsion to act definitely and immediately. (Record p. 109.) On the 26th of February the Transportation company directors passed a resolution approving the new agreement, and directing the president and secretary to "*execute*" it. (Record 190; p. 126.) At the same meeting they voted to call a special stockholders' meeting on March 18th, to which their action should be submitted for approval. Of *this resolution of the directors* the Pullman company had no information or notice, (Rec., pp. 62, 68–9, 74, 103–108); and there was no condition expressed that the "execution" which was ordered of the contract should not be valid until approved by stockholders. The meeting adjourned to the 27th, the next day. At that meeting, on the 27th, the draft of the contract being completed and present before the board, it was adopted absolutely and unanimously. The minutes direct no reference to a stockholders' meeting for the finality of the contract. The Pullman representatives were present, and while the directors were still assembled and still in their places, (Rec., p. 54, 67, 102, 112), they were introduced to the meeting, and informed in the presence of the whole board that the agreement had been

adopted. A desire was again expressed to put into the agreement a reservation for the action of the stockholders, but the officers of the Pullman company again refused to accept the contract in such form; and the subject was dropped. (Rec., p. 83, 96.) *They were not informed* of the resolution of the day before concerning a stockholders' meeting. (Rec., pp. 42, 67, 82, 103–104.) The matter with the railway company had to be concluded the next day or not all, and it is easy to see that the situation compelled the position assumed. The execution of the contract was deferred until the next morning, because the seal of the company was not at hand, (Rec., p. 54, 83, 96), and appointment was made for that purpose at nine o'clock because appointment had been made with the railway company at eleven o'clock. The next morning the contract was executed by the president and secretary of the Transportation company, under its corporate seal, and delivered to the president of the Pullman company, and upon the strength of that the present contract with the Pennsylvania Railroad Company was immediately made, and the Pullman company became conclusively committed to its performance.

Afterwards said agreement was disapproved and rejected by the stockholders; and subsequently the said plaintiff in error, without further effort to agree with defendant in respect to the sum or share of net earnings to be paid under said contract, as provided in Section *Eight*, asserted its legal right to demand payment of the original sum of $264,000, and brought these suits therefor.

On the trial a special plea presented the contract of February 27, 1885, called the "Modified Lease." That plea seems to have been omitted from the printed rec-

ord, although its substance is sufficiently indicated by the replication to it, printed on page 13, and the agreement referred to is shown in the record at pages 16–18. It was offered in evidence in two aspects: (1) as being in itself a complete and valid contract, substituting as such its own provisions for those of the original lease; (2) as showing that the provisions of Section *Eight* had been acted upon and put in force, with the result that even if the new contract were not effectual as to the particular rental and other compensation specified, it nevertheless established that the original rental had been superseded, and that no recovery could be had for more than actual earnings under the new railway contract. (Record p. 49–50, 80.)

A definitive Election was declared under Section Eight, and the "Modified Lease" was founded on that Election.

It is not open to doubt that in making the modified lease, and in all the proceedings that led up to it, the parties intended to act, and understood that they were acting under and in execution of Section *Eight* of the original lease. That section is as follows:

"8. In the event that any of the railroad companies mentioned in the assigned contracts shall at any time during this agreement refuse to permit the cars of the second party to be run on and over their respective lines of roads, so that by reason of such prevention or refusal, the profits, income, revenue derived from and under any other and remaining contracts with other and remaining railroad companies mentioned in the assigned contracts shall fall below the sum of two hundred and sixty-four thousand dollars ($264,000), then and in that event said second party shall *have the right either* to declare this contract null and void, and surrender to said first party the said hereinbefore demised property, *or shall* and will *pay* in like manner, *in lieu of* the said sum of two hundred and sixty-four thousand dollars ($264,-

000), such sum or share of the net revenues *from the remaining lines* of roads as the parties hereto may at that time agree upon."

In this section certain things are salient to which we call attention in order to show how these distinctive features re-appear in the modified lease itself and in the minutes of the proceedings of the directors of the Transportation company. These features are conspicuous:

That the provisions of the section were dependent upon the occurrence of a specified condition.

That upon the occurrence of the condition the provisions of the section would determine certain *rights* of the Pullman company. If under it the lease was not canceled but continued in force, then that section would be material in the future relations of the parties, but not otherwise.

That under that section, unless the lease was canceled, the Transportation company would be "entitled to receive" a "share of the profits" under the lease, but in no other case.

That under this section, if the lease were not canceled, the future rent would be payable out of earnings, and the earnings are made a fund "applicable to that use."

That except as the provisions of Section Eight in its second alternative become dominant between the parties, the rental could have no relation to earnings; the lessor no interest in them beyond their effect on the solvency of the lessee; and they would be no more "applicable" as a fund to payment of rental than any other asset of the lessor.

Now look to the contract which was accepted by the

Pullman company and to the minutes of the directors' meetings of the Transportation company approving that contract, for their indications concerning the *status* at which the parties had arrived and the basis upon which they understood they were acting and intended to act. Observe first (Rec., p. 16), the preliminary recitals of the contract, the modified lease itself.

"This agreement made the 27th day of February, by and between the Central Transportation Company, hereinafter called the Transportation company, and Pullman's Palace Car Company, hereinafter called the Pullman company, Witnesseth:

"WHEREAS, the Transportation company did heretofore by indenture, bearing date the 17th day of February, 1870, lease" &c., reciting the making of the original contract of lease:

"AND, WHEREAS, *In said lease* it was, amongst other things, provided as follows, to wit: (Here is *set out at length, said Section Eight.*)

"AND, WHEREAS, Certain of the railroad companies mentioned in the assigned contracts *have refused* to permit the cars above mentioned, to run over their respective roads, *leaving certain of the Pennsylvania lines*, so-called, *substantially the only remaining lines* of railroad *mentioned in said assigned contracts;* * * *

"AND, WHEREAS, In consequence of the expiration of its contract with the Pennsylvania Railroad Company aforesaid, the Pullman company, pursuant to its covenants in said lease in that regard, and with the approbation of the Transportation company, and its influence exerted as far as practicable, *has been negotiating a new contract;* * * *

"AND, WHEREAS, *The income and revenue to be derived* from and under such proposed contract, *applicable to the payment of rentals* to the Transportation company under the lease aforesaid *will fall much below the sum of $264,000;* * * *

"AND, WHEREAS, It has become necessary that *the lease aforesaid* should be *modified* in respect to the *rentals* to be paid the Transportation company, *and otherwise as herein provided;*

"*Now, in consideration of the premises*, the parties do agree as follows:

In the foregoing are merely *recitals* of already established and existing facts which constitute the *inducement* to the contract. They are *not* the contract itself. The contract consists of elements altogether distinct.

Of the same character are the recitals contained in the minutes of meetings on the 26th and 27th of February, 1885, of the board of directors of the Transportation company. On reference to those minutes will be found a record like the following:

"On motion of Mr. Wright, seconded by Mr. Howard, the following was offered:

"WHEREAS, The contract between the Pullman's Palace Car Company and the Pennsylvania Railroad Company expired January 27, 1885; and, * * *

"WHEREAS, Long and repeated interviews have been had between the representatives of the Central Co. and the Pullman's Car Co., in reference to the amount of such rental *based on the contract* that the latter company could make with the Pennsylvania Railroad Co.; and,

"WHEREAS, From an examination of the provisions of such proposed contract with the Pennsylvania Railroad Company *it appears* that the *share of the profits which this company will be entitled to receive therefrom*, fall much below that received by it under the preceding contract which has expired. * * *

[The minutes then contain and set forth *a copy of the contract proposed with the Pullman company*, which is above recited, and proceed]:

"A vote was taken *on approval or disapproval of the foregoing agreement.* The result was: * * *

After which Mr. Lockard asked Mr. McClary to make the vote unanimous, which was done, *and the agreement was unanimously approved of.*

"On motion the board adjourned."

Now, why do the parties thus recite in full length the provisions of Section Eight? Why do they specifically

Clough v. *London & N. W. Ry. Co.*, L. R. 7 Ex., 34.
Mallam v. *Arden et al.*, 10 Bing., 299.
Sanger v. *Wood*, 3 Johns Ch., 422.
Connihan v. *Thompson*, 111 Mass., 272.
Gath v. *Lees*, 3 H. & C. Ex., 558.
Brown v. *The Royal Ins. Co.*, 1 E. & E., Q. B., 853.
Rodermund v. *Clark*, 46 N. Y., 357.

The Pullman company had so acted that when the modified lease was executed, the parties were certainly proceeding under Section Eight. Under that section there existed a single alternative—to *annul* the lease *or* to operate it upon a share of the earnings basis. It had not annulled the lease, therefore it had elected to run under it, with a right in the Transportation company to a share of the earnings. At least from the moment it accepted the modified lease and made its railway contract with the Pennsylvania company it was committed to that election, from which it could not alone recede. *Action for an instant under* Section *Eight* determined a conclusive election, and the parties were certainly acting under that section. The Pullman company was committed to the *legal effect* of such action, whatever, and however conclusive, that legal effect might be. It had advanced to a point from which it could not recede alone, nor without a new contract to that effect escape the obligation to share with the Transportation company the earnings under the Pennsylvania contract. The original covenant upon which the suit was brought was superseded and at an end, and *no action upon it was maintainable*. *Kinney* v. *Kiernan*, 49 N. Y., 164.

If the agreement in the modified lease upon the spe-

cific compensation therein specified failed to bind the Transportation company, that did not disturb the fact that the relations of the parties had come to be governed by the provisions of Section Eight, and that it could maintain no action except for a share of the revenue under the Pennsylvania contract. But all this action of the parties the court below held to be *without any legal effect*. With all this evidence in the case the court treated the question as one of fact as to an election instead of one of the legal effect of what had been done. It declared there was no evidence sufficient to justify the jury in finding an election at all, and the charge to the jury is silent upon the subject.*

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*The record contains the following:

THE COURT: I do not see what this has to do with the matter.

MR. BULLITT: It is to support the last branch?

THE COURT: It is for the purpose of supporting the last branch of the defense opened by Mr. Dickson, to wit: that you have a right to ask that the plaintiff shall be satisfied with a verdict here for such a sum as is equal to the net profits of the road?

MR. BULLITT: That is it.

MR. JOHNSON: As Mr. Bullitt defines the reason I object to it as irrelevant to any issue raised in these pleadings. That is the first objection. My second objection is this. The clause is one that your Honor is familiar with. (Reading same.) Now, they have not averred that there was an election by them, or form of an election, to abide by that.

MR. BULLITT: In the agreement which has been referred to, and which is now in evidence in this cause, there are found certain recitations. (Reading same.) I suppose this is as clear a recognition of the purpose of the company to avail itself of the option to pay what was an agreed net revenue as any language could be. It seems to me in view of those recitations in that contract that it is an entire answer to the objection which is being made on the score that they have not exercised their option.

(Objection sustained. Exception by defendant.)

MR. DICKSON: Do you waive your objection in regard to the plea?

MR. JOHNSON: No.

MR. BULLITT: The defendant further offers to prove that by reason of the refusal o- the railroad companies mentioned in the assigned contracts to permit the cars of the ded fendant to run over their respective lines of road, the profits, income and revenue derived from and under the only other and remaining railroad company mentioned in the assigned contracts have fallen below the sum of $264,000, and the entire net revenue from the said remaining line of road is less than the sum of $66,000 per annum, and the defendant gave notice of its intention to declare the contract null and void and to surrender the demised property unless the rentals should be reduced to a sum not more than $66,000, and of its election to pay such net revenue in lieu of the original rental.

By MR. JOHNSON: I have no objection to that.

THE COURT: The court will first require evidence of the election. If you choose, you can put in writing a statement of what you rely upon to prove the option, and the court will rule whether it is competent evidence to prove it or not.

MR. BULLITT: Perhaps it will save time for the present to waive this point and go on upon another point, and we will be prepared in the morning probably to put it in a shape where it can be dealt with a little more intelligibly than it can now.

MR. DICKSON: We now desire to renew our offer as made on pages 142 and 143 of the notes, stating that the evidence already in of what passed between the parties was the evidence of the election upon which we rely.

(Objected to.)

THE COURT: For the reasons stated yesterday the court sustains the objection upon the ground that there is no evidence of an election prior to the commencement of this suit, either to return the property rented and held, or to pay over the net earnings referred to in the contract in case a new contract was not agreed upon by the parties—no evidence that would justify the jury in finding such an election.

(Exception by defendants.) (See record pages 49, 50, 80, 123, 124, 129.)

The substitution of a share of revenue for the original rental was by exercise of an independent right in the Pullman company under the original lease; and was not involved in the contract called the modified lease.

It is of no moment, therefore, *in this respect*, whether the modified lease is upheld as binding or not. The *abrogation* of the original covenant to pay the fixed sum of $264,000 per annum, and the *substitution* of a division of the actual revenue are *not dependent upon* that contract. *They form no part of* that contract; and its subject-matter is another thing. Plainly the alternative rights given are "either" to *annul* the lease "*or*" to *pay a share* of the net earnings and *continue it* in operation. The determination of the matter to that extent lay with the Pullman company. Within the scope of this right and the exercise of this power lay the extinguishment of the original covenant and the substitution of the new obligation. Beyond that lay the subject-matter of the *division of the fund* produced by the earnings and the settlement of the *amount* of the share the Transportation company "would be entitled to "receive therefrom." This and some "modifications" arising from the conditions of the new railway contract make up *in toto* the subject-matter of the modified lease. They *constitute* and of themselves make up the *contract*, and were *these:* The railroad company reserved the right to cancel its contract at specified intervals of time, and the original lease was modified by the provision that it should terminate in such an event. The railroad company reserved the right to purchase and take to itself an interest in the business of the Pullman company on its lines. To that extent the revenues of the Pullman company would be reduced; and the original lease was modified by the

provision that in such event the amount to be paid the Transportation company should be accordingly abated. Instead of a rental or consideration to the Transportation company payable in money only, as provided in the original lease, the directors had approved a consideration consisting of a money payment, and the payment of a share of the Transportation company's taxes, *and* of a right to *exchange the stock* of that company for stock of the Pullman company. None of these things were provided for by the original lease. They were new elements. Each and all were, in the very language of the stockholders' resolution, "*modifications*" of the original lease itself. These are the elements *which make up the contract*. They are the specific provisions stipulated therein between the parties; and it was this contract, consisting of *these* stipulations, which the directors, by their resolution, proposed to submit to their stockholders for approval.

But it was not the action of the Pullman company in exercising its alternative rights given by the original lease, nor the legal effect of that exercise of those rights which they thought of submitting to their stockholders for approval. Upon those subjects the directors and stockholders were equally powerless. Those matters antecedent to the modified lease, and the election of the Pullman company which brought Section *Eight* into action were not within the scope or intent of the resolutions of the directors or stockholders. They are *not included in the terms* of the contract. They were not a subject-matter for contract. They were provided for in the original lease. To give effect to the terms of a contract is not to "modify" it. Performance of it is not modifying it. They are recited in the preambles to the

resolution of the stockholders, and are recited in the preambles to the modified lease itself as antecedent matters already established, and as the basis upon which the contract for modification of the lease was made. They are shown in those preambles merely as having become the foundation upon which the parties stood, but they are not elements in the contract itself.

It is inconceivable that the fact of such election as is indicated could have been the subject of doubt. Out from the records of the Transportation company come conclusive proofs that such election had been made in fact, in legal effect, and in the understanding of the parties; and also equivalent illustration of the ingenuity which begot the claim on which the declaration in this case is based. If at the stockholders' meeting, when the modified lease was rejected, it appeared that the Pullman company was definitively committed to its new contract with the Pennsylvania railway, from which it could not escape; that its rights under Section *Eight* were possibly waived or exhausted; that the stockholders had but to *arbitrarily* reject the modified lease and let the Pullman company find itself bound to the perpetual payment to them of the old rental of $264,000 a year whether it could be earned or not, we may, without looking further, find in this, in the present unsanctified state of the human spirit, a sufficient inducement to a rejection of the contract by vote of a majority as large as is shown in this case. (Rec., p. 47.) But is it credible that the Pullman company had walked into such an ambush? Look at the relation of the parties. With the ending of the Pennsylvania contract in January, 1885, came substantially the ending of all revenue under the lease. Upon what consideration can it be imagined to have sus-

pended any election and any action under Section *Eight*, and continued to go on with the railroad service? What was its liability while so going on? Is it credible for a moment that it did this thing without any guaranty to stand between it and the accumulation of the old rental? If there was such guaranty for its protection, what could it, or what in the nature of things would it have been but this very election which everybody in the world connected with the transaction, and the records of the Transportation company prove to have been made? To pretend that the Pullman company consented to waive and ignore the safeguards in Section *Eight*, and to run on at $264,000 a year *until* the stockholders of the Transportation company should *voluntarily consent and agree to take less*, is one of those propositions whose conspicuous absurdity is *conclusive judicial evidence* that it is not so.

The rejection of the modified lease did not revive the original covenant which had been abrogated by the legal effect of an election under Section *Eight*, and judgment should not have been rendered for more than a just proportion of the fund which had arisen from the earnings under the new railway contract.

It was not competent, by parol evidence, to contradict the purport of the minutes of the directors' meetings of February 26 and 27, 1885, or to qualify the act of delivery of the modified lease as an executed contract.

In its charge to the jury the court said:

"First. Was the paper delivered with the under-
"standing that it was to take effect immediately, free
"from the contingency stated—of approval by stock-
"holders? If it was, then—

"Second. Had the officers who so delivered it "authority to do this?

"To sustain the defense, therefore, you will observe "and bear in mind that both these questions must be "found in favor of the defendant. If the paper was "not delivered with the understanding that it should go "into effect immediately, without submission to the "stockholders, then you need go no further, for in such "case the second question—respecting the authority— "will not arise." (Rec., 190, p. 129. See, also, pp. 19, 45.)

The minutes of the directors' meeting of February 26th, show a single and specific resolution by which the president and secretary are authorized "to execute," on behalf of the company, the modified lease. Power to execute an instrument includes the delivery. "The term is "frequently used in law: as, to 'execute' a deed, which "means to make a deed, *including* especially signing, seal- "ing and *delivery*." Bouv. Law Dict., sub. Tit. The minutes also show a single and separate resolution that a meeting be called on the 18th of March of the stockholders, to whom should be submitted the action of the board for their approval. Neither of these resolutions contains a reference to the other. The minutes of the meeting of February 27th contain no reference to any resolution concerning a stockholder's meeting, but show simply an absolute approval of the modified lease. The representative officers of the Pullman company were at hand when that meeting was held, and *they were then informed*, while the directors were all present and still in their places, that the contract had been unanimously approved. The directors, evidently reluctant to act absolutely though they had the power, expressed

a desire to *insert a clause in the lease* reserving the matter for their stockholders, but the Pullman representatives absolutely refused and the subject dropped. There was no time for that, as the railway contract might itself be lost. They *were not informed* of the resolution of the day before directing a meeting of stockholders, and never had notice of it until after the delivery of the contract. We submit that being thus informed there was no obligation to pursue inquiry further, and the Transportation company is estopped to deny the power of its officers to deliver the lease.

Moreover, the minutes of the day before contain no declaration that the deed should not be valid until approved by the stockholders. There is no condition in terms upon the express authority to "*execute*." Now, this *absoluteness* of the power to sign, seal and deliver the lease, and a limitation that it should not take effect except upon a future contingency, are inconsistent. Both cannot stand. If the condition stands, the absoluteness of the power, as it is given, is destroyed. If the power is upheld as its terms declare it, the pretended condition disappears. The power cannot be both absolute and conditioned. It is a rule of construction that if there be an intendment which will support the terms of both these resolutions, that one must be taken as against another that would involve a contradiction. And both may stand. There is no necessary contradiction. Taken together they represent an ordinary course of the transaction of the business of corporations. The situation is not the same as if such a condition had been expressed, and had explicitly been put upon the power. It was not competent then to import that contradiction and the equivalent of an express

condition into those minutes, by oral evidence; and unless this is permitted, the officers were given absolute authority to deliver the lease.

The modified lease under the corporate seal was regularly delivered by the president and secretary to the Pullman company, and accepted, and the contract was immediately concluded with the Pennsylvania company. Oral testimony was admitted, though it was contradicted, to show that the delivery was made and accepted subject to an understood condition that the lease was not to become operative until it had been approved at a meeting of stockholders. Such power had been given to execute and deliver the lease that its actual delivery made it in legal effect obligatory upon the Transportation company. Of the fact of delivery, there is no question; and the lease in completed condition was delivered not to a third person but directly to the lessee. Such a delivery is in its legal nature absolute; and parol evidence of a condition contrary to the delivery and to the terms of the lease is inadmissible. *Moss* v. *Riddle*, 5 Cranch., 357; *Worrall* v. *Munn*, 1 Seld. (N. Y.), 238; *Braman* v. *Bingham*, 26 N. Y., 491; *Leiter* v. *Pike*, 127 Ill., 287. Such an oral understanding would of course be merged and lost in the specialty of the corporation. Ang. & Ames. on Cor., § 219.

If the board of directors, by action at a meeting in legal form, had not already so imposed this condition upon the execution of the deed that the lessee was charged and bound thereby, then these *individuals*, though they were in fact directors, could not lawfully stipulate for such a condition for their corporation. No action of theirs in that mode, in such a matter, could be corporate action. No declaration or stipulation of

theirs could qualify, for or against their corporation, the legal effect of what the board had actually already done. Angell & Ames on Corporations, § 309.

In conclusion, upon this branch of the case, we submit that the resolutions of the Transportation company's directors on the 26th of February, 1885, were not in terms in conflict, and should not be made so by oral evidence. Taken and *construed together both may be supported*, for they represent only an ordinary method and course of corporation business. They are not inconsistent in themselves with the immediate execution of the lease until made so by extrinsic testimony which is not admissible. Moreover, the directors, assembled at their meeting on the subsequent day, having informed the Pullman representatives that the lease had been approved without notice of any condition intended, were estopped to import such a condition by parol; and parol evidence is altogether inadmissible to contradict the legal effect of delivery of the specialty and the terms of the instrument itself.

In any event the exercise of the powers conferred by Section *Eight* of the original lease, had abrogated the covenant on which the action was brought, and judgment should have been limited to the actual revenue or earnings in the enterprise to which both parties contributed, namely, the operation under the new railway contract.

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